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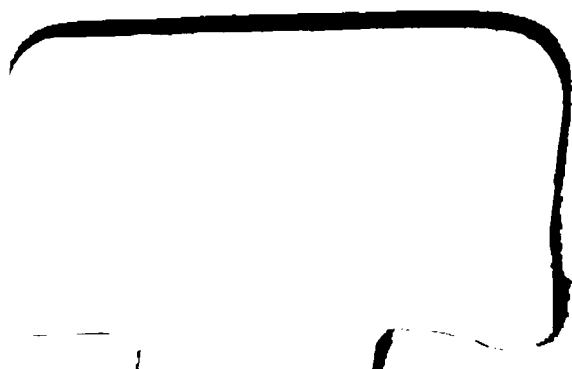
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THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XIV.

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AMERICAN STATE REPORTS.
VOL. XIV.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

JONES v. HORN,

[51 ARKANSAS, 19.]

DAMAGES, WHERE DEFENDANT HAS A SPECIAL LIEN OR INTEREST. — If the defendant is a mortgagee, and as such is entitled to the possession of and is vested with power to sell property which he unlawfully seizes, and he becomes a wrong-doer by reason of his manner of acquiring possession, or of some irregularity in making the sale, he is liable to his mortgagor only for the value of the property at the time of the conversion, less the amount of the mortgage lien.

LANDLORD'S LIEN, RECOUPMENT FOR AMOUNT OF. — If a landlord having a lien on a tenant's crop unlawfully converts it, he is, when sued for such conversion, entitled to have deducted from the damages otherwise allowable the amount of such lien.

ACTION by Jones against Horn for unlawfully taking and converting certain property of the former, and for the use of such property. The defendant justified the taking under a deed of trust made by Jones to B. M. Cook for the purpose of securing an indebtedness to V. Y. Cook, and which indebtedness had been sold and transferred to the defendant, Jones. The latter was also landlord of the plaintiff, and as such entitled to a lien for rents. The case was tried before a jury. The fact that the taking was unlawful was conceded, but the defendant claimed the right to have deducted from the damages otherwise allowable the amount secured to him by the trust deed, and also the amount secured to him as landlord by lien on the plaintiff's crop. The instruction of the court to the jury was to the effect that if the defendant had a right to foreclose the lien created by the trust deed, he was entitled to have deducted from the value of the property converted the

amount of the debts secured by such deed. The jury allowed the defendant the deductions claimed by him, and therefore the plaintiff appealed.

Robert Neill, for the appellee.

Coleman and Yancey, for the appellant.

COCKBILL, C. J. It appears to have been conceded on the trial that the defendant was a wrong-doer, and liable to the plaintiff for the conversion of the property in question. The controversy turned on the rule of damages. The rule is, that wherever the defendant has a legal or equitable interest in or claim upon the specific property for the conversion of which he is sued, the recovery against him is limited to the actual net amount of the plaintiff's interest, although the possession is wrongly assumed or retained. This fully indemnifies the plaintiff, and leaves the balance of value in the hands of him who is entitled to it, thus settling the whole controversy in one suit.

Where the defendant is a mortgagee who was entitled to the possession, with power to sell at the time of the seizure or conversion, and who has become a wrong-doer by reason of the manner of acquiring possession, or in the irregularity of the sale, he is liable to the mortgagor (in the absence of proof of special damages) only for the value of the property at the time of the conversion, less the amount of the mortgage debt: *McClure v. Hill*, 36 Ark. 268; *Street v. Sinclair*, 71 Ala. 110; *Chamberlin v. Shaw*, 18 Pick. 278; 29 Am. Dec. 586; *Brinck v. Freoff*, 44 Mich. 69; *Brown v. Phillips*, 3 Bush, 656; Sedgwick on Measure of Damages, *482, note 2, and cases cited; Jones on Chattel Mortgages, sec. 437.

The jury in this cause found, in effect, that the mortgagors' neglect of his crop had worked a forfeiture by the terms of the mortgage, and that the right to take and sell the property for the defendant's benefit existed at the time it was exercised. It was only for the improper method of exercising his rights that the defendant was mulcted in damages. It is obvious, therefore, that the value of the property at the time of the conversion, and not at some subsequent period, should govern.

The defendant was also the landlord of the plaintiff, and had a lien on the crop, which he converted for rent. This specific lien was also the subject of recoupment in his favor, and it was not error to admit proof in regard to it. If the jury, in estimating the damages to be assessed against the defendant, gave him the benefit of the amount due him for

rent, they did no more than they should have been instructed to do. If they allowed him nothing upon that account because they understood the court to instruct them not to do so, the error was favorable to appellant. The evidence of the value of the property was conflicting. In any view, the verdict is within the evidence; the charge was favorable to the appellant, and the judgment will not be disturbed.

Affirm.

TROVER — AS TO WHAT DAMAGES ARE RECOVERABLE in actions of trover: *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426, and cases cited in note 431. Plaintiff in an action of trover may recover the value of the converted property with hire: *Emard v. Frick*, 76 Ga. 512; and in determining what is the value or what was the value of property at the time of its conversion, the cost of such property may be considered as a circumstance to aid in ascertaining such value: *Angell v. Hopkins*, 79 Cal. 181.

TROVER — LANDLORD AND TENANT. — Trover will not lie where a landlord, under a lease, by the terms of which he was to have a share in the crops, took possession of the crops when they had been gathered, and refused to divide, because the property was not in a fit condition for division: *Shearin v. Riggsbee*, 97 N. C. 216; for under such a lease, a landlord and tenant are merely tenants in common with respect to the crops, and being tenants in common, cannot maintain trover against each other: *Id.*; *Baughman v. Reed*, 75 Cal. 319; 7 Am. St. Rep. 170, and note 172. But a share-cropper or his mortgagee can maintain trover for converted crops, when he had a right to have his share set apart as wages, or might have asserted a lien upon such crops for his wages: *Parks v. Webb*, 48 Ark. 293. And so the owner of sheep may maintain trover against his lessee and the purchaser from such lessee, for a joint conversion of wool, they having failed to set apart his share of such wool, and refused to deliver it to him upon demand; notwithstanding the purchaser was ignorant of plaintiff's rights as to a part of the wool: *Chamberlain v. Shaw*, 18 Pick. 278; 29 Am. Dec. 586, and note 590.

CONVERSION BY A MORTGAGEE. — Ordinarily a chattel mortgage vests the legal title to the property in the mortgagee, with a right to the possession thereof, and for that reason the general rule is, that a mortgagor cannot sue his mortgagee in a chattel mortgage for alleged conversion: *Hill v. Merriam*, 72 Wis. 483. But when a mortgagee in a chattel mortgage becomes a purchaser at his own sale, for a grossly inadequate price, and converts the property to his own use under the title vested by such a colorable sale, and refuses to allow the mortgagor to redeem, he is guilty of conversion, and responsible to the mortgagor for the fair value of the converted property: *Lee v. Fox*, 113 Ind. 98; and so, by keeping a surplus remaining in his hands after a sale under a chattel mortgage, a mortgagee may be guilty of conversion: *Bearse v. Preston*, 66 Mich. 12; *Cooper v. First National Bank*, 40 Kan. 5. And a mortgagee may be guilty of conversion when he takes possession of the mortgaged property without authority, the terms of the mortgage stipulating that the mortgagor should retain possession until condition broken: *Harder v. Hosp*, 69 Wis. 283.

RECOUPMENT IN ACTIONS BETWEEN A LANDLORD AND TENANT: See note to *Van Bpps v. Harrison*, 40 Am. Dec. 335, 336.

NICHOLS v. COUNCIL.

[51 ARKANSAS, 26.]

HOMESTEAD UNDER LAW OF THE UNITED STATES, CONVEYANCE OF. — An agreement to convey or a conveyance by a homesteader, executed before his entry is completed, is against public policy and void, and the courts will so declare it, notwithstanding the homesteader is the plaintiff, and as such is seeking to avoid his own contract or deed.

RIGHT OF SOLDIER TO ADDITIONAL HOMESTEAD UNDER THE STATUTES OF THE UNITED STATES IS INALIENABLE before such right is perfected, and if a power of attorney is given by a soldier to convey lands of which he may be or become seised, including any which may be located under the soldiers' additional homestead act of June 8, 1872, and if thereafter an entry is made in his name, followed by a conveyance by his attorney in fact, acting under such power of attorney, and afterwards final proof is made and a patent issued, such conveyance is void.

STATUTE OF LIMITATIONS. — WHERE TITLE IS ACQUIRED BY PATENT FROM THE UNITED STATES, the statute of limitations cannot operate against such patentee until his right to the patent becomes perfect, and such right is not perfect in one who has made an additional homestead entry under the laws of the United States until the patent certificate issues upon which such patent was based.

Cos. Altenberg, for the appellant.

Edward H. Mathes, for the appellees.

COCKBILL, C. J. Nichols brought his action of ejectment in 1886 against Council for the possession of eighty acres of land, relying upon a patent from the United States, issued, as it recites, "pursuant to the act of Congress approved 20th May, 1862, to secure homesteads to actual settlers on the public domain, and the acts supplemental thereto." The homestead entry upon which the patent is based was made November 13, 1875, the final proof certificate issued January 12, 1885, and the patent followed in November of the latter year.

The defense was a conveyance from the plaintiff to the defendant's ancestor, and seven years' adverse possession under that claim of title.

The conveyance under which defendant claims was executed by one Wittich on the eighteenth day of November, 1875, pursuant to a power of attorney from the plaintiff, dated August 24th of the same year. It empowered the attorney to convey any lands of which the plaintiff was then or might thereafter become seised, including any which might be located under the soldiers' additional homestead act of June 8, 1872, under which, the instrument recited, the plaintiff was then entitled to enter 120 acres in addition to what was called his "[my] forty-acre homestead."

From this statement it will be seen that the power of attorney, which is the basis of the defendant's claim of title, was executed by the plaintiff before he had made application to enter the land for a homestead. But it is against the policy of the United States homestead laws to permit a conveyance of any part of the homestead before the entry is completed. An agreement to convey or a conveyance by the homesteader is therefore void, and it is the recognized doctrine that the public interest requires that the courts shall lend their aid to carry out the policy of the statute, notwithstanding the homesteader is the plaintiff, and party to an agreement looking to the violation of the law: *Cox v. Donnelly*, 34 Ark. 762; *Sorrels v. Self*, 43 Id. 451; *Shorman v. Eakin*, 47 Id. 351; *Marshall v. Cowles*, 48 Id. 362.

It is argued that the land in suit was entered by the plaintiff as a soldier's additional homestead under the act of June 8, 1872, and that the inhibition of sale contained in the original homestead act does not apply to this class of homesteads. The record does not make apparent the fact contended for, but the conclusion as to the law would not follow if we should view the facts as the appellee does.

What is known as the soldiers' additional homestead right is the privilege granted by the second section of the act of June 8, 1872, to honorably discharged soldiers and sailors who had previously made homestead entries of less than 160 acres to make an additional entry of a sufficient number of acres to make the aggregate 160. The act is supplemental to the original homestead law. The first section, which favors the veteran by deducting his time of actual service from the period of residence on the land required by the general homestead law, expressly requires of those who attempt to take advantage of its terms a compliance with the provisions of that law, except as modified by the new act. One of those provisions is an affidavit by the enterer, on making final proof, that he has not alienated any part of the land. The soldier who makes an original homestead entry under this act is then, by the express terms of the law, subject to this provision, and there is no general policy manifested by the act to remove his incapacity to alienate before final entry. The section which confers the additional homestead right contains nothing that indicates a change of this policy. No procedure to govern in making the additional entry is provided. The old law, therefore, so far as applicable, must govern, for no rule of construc-

tion warrants the conclusion that a repeal of the law in force at the passage of the act was intended, except as it is expressly changed or irreconcilably conflicts with the last act. Whatever other proof required by that law is dispensed with in an effort to acquire the additional homestead, that of non-alienation has not been. The practice adopted by the land department requires it: See *French's Case*, 2 Land Decisions of Interior Department, 235.

It follows that the additional homestead which the soldier may acquire is inalienable before the right is perfected. This leaves the defendant to stand upon his plea of adverse possession. But the statute of limitations could not be put in motion while the title was yet in the United States: *Gibson v. Chouteau*, 13 Wall. 92; *Simmons v. Ogle*, 105 U. S. 271.

If the statute can run at all before the patent issues, it would be only in a case where the right to the patent has been completed by the performance of every act going to the foundation of the right. In such cases it has been held by the supreme court of the United States that the land is segregated from the public domain; that it becomes private property, and consequently the subject of sale for taxes: *Witherspoon v. Duncan*, 4 Wall. 210; *Union Pac. R. R. Co. v. McShane*, 22 Id. 444; *Van Brocklin v. Tennessee*, 117 U. S. 151. The same reasoning, it would seem, would give operation to the statute of limitations. But in this case the right to the patent did not accrue until the patent certificate issued in 1885, which was only one year before suit was brought. The verdict and judgment, then, cannot be sustained on that theory.

Reverse the judgment, and remand the cause.

HOMESTEAD. — A valid mortgage may be given by one who has made entry under the homestead laws of the United States, upon the land so entered, before he has made final proof, and received the certificate thereof: *Lang v. Morey*, 40 Minn. 396; 12 Am. St. Rep. 748, and note. Chapter 5 of the Revised Statutes of the United States, requiring a homestead claimant of public lands to be an occupant thereof, and restricting his right to alienate the same prior to the issuance of the patent, is not applicable to the additional homesteads allowed to honorably discharged soldiers; and such additional homesteads may be located, entered, and alienated by the soldier even before a patent is issued to him: *Rose v. Nevada etc. Co.*, 73 Cal. 385. It will be observed that the case last cited is in direct conflict with the principal case. The question is one of very great importance in many localities, and must remain in doubt until finally determined by the national courts. Where a party has entered land under the homestead laws, and made final proof, and complied with all the requirements on his part entitling him to a patent, he may make a valid dedication of a part of such land for public purposes, prior

to the issuance of his patent: *Rube v. Sullivan*, 23 Neb. 779; compare *Burkington etc. Ry Co. v. Johnson*, 38 Kan. 142.

STATUTE OF LIMITATIONS. — The statute of limitations will run against a party entering upon land under the laws respecting public lands, or his grantee, in favor of one holding adversely from the date of the entry: *Carroll v. Patrick*, 23 Neb. 835.

PENZEL v. BROOKMIRE.

[51 ARKANSAS, 105.]

WHEN A MORTGAGE IS MADE TO SECURE SEVERAL NOTES which mature at different times, and are assigned to different persons, and the proceeds of the mortgaged property are not sufficient to pay all of the notes, such proceeds must be distributed among the different holders *pro rata*, irrespective of the dates of the assignments or of the maturity of the different notes.

Hall and Carter, for the appellants.

Jacoway and Jacoway, and *W. A. Nolen*, for the appellees.

BATTLE, J. On the 16th of March, 1885, James Quigel executed to West Brothers three promissory notes, one for \$150, due on the 16th of June, 1885, one for \$125, due on the 16th of August, 1885, and the other for \$116, due on the 16th of November, 1885, and at the same time executed a mortgage to secure their payment. On the 17th of March, 1885, West Brothers transferred the note for \$150 to Charles F. Penzel, and thereafter transferred the one for \$125 to H. Friedlander and Son, as collateral to secure a debt, and the one for \$116 to Brookmire, Rankin, and Scudder. After the maturity of the first two notes, Penzel took possession of a part of the mortgaged property, and sold the same, with the consent of all parties concerned, at private sale, for \$216, on a credit, of which \$50 have been collected.

The mortgage contained no stipulation as to the order in which the notes should be paid. It is not alleged in the pleadings, and was not claimed in the court below, and is not insisted on here, that there was any agreement between the mortgagees and any one of their assignees as to the order of precedence each note should take, or that there was any special equities arising out of the assignments. There is no issue of that kind in the case. Appellants insist that Penzel should be first paid out of the property mortgaged, because he is the holder of the note first falling due, and first assigned;

and appellees insist that the proceeds should be paid ratably upon the notes, without regard to the order in which they fell due or were assigned. The only question here is, Which of these contentions is correct?

In the absence of such a stipulation or agreement, or special equities, the authorities are not agreed as to how the proceeds of the sale of property mortgaged to secure the payment of several notes, and sold under the mortgage, shall be appropriated, when the notes secured mature at different times, have been assigned to different persons, and the proceeds are not sufficient to pay all of them. One class holds that the notes shall be paid in the order of their assignment: *McClintic v. Wise*, 25 Gratt. 448; 18 Am. Rep. 694; *Cullum v. Erwin*, 4 Ala. 452; *Griggsby v. Hair*, 25 Id. 327; *Waterman v. Hunt*, 2 R. I. 298. Another, that the notes should take precedence in the order of their maturity: *Mitchell v. Ladew*, 36 Mo. 526, 530; 88 Am. Dec. 156; *Sargent v. Howe*, 21 Ill. 148; *Vansant v. Allman*, 23 Id. 30; *Koester v. Burke*, 81 Id. 436; *State Bank v. Tweedy*, 8 Blackf. 447; 46 Am. Dec. 486; *Doss v. Ditmars*, 70 Ind. 451; *Marine Bank v. International Bank*, 9 Wis. 57, 64; *McVay v. Bloodgood*, 9 Port. 547; *Richardson v. McKim*, 20 Kan. 346, 350; *Hinds v. Mooers*, 11 Iowa, 211; *Walker v. Schreiber*, 47 Iowa, 529; *Wilson v. Hayward*, 6 Fla. 171, 190; *Kyle v. Thompson*, 11 Ohio St. 616; *Winters v. Franklin Bank*, 38 Id. 250. And a third class, that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment: *Donlay v. Hays*, 17 Serg. & R. 400, 404; *Cowden's Estate Appeal*, 1 Pa. St. 278; *Mohler's Appeal*, 5 Pa. St. 418, 420; 47 Am. Dec. 413; *Perry's Appeal*, 22 Pa. St. 43, 45; 60 Am. Dec. 63; *Grattan v. Wiggins*, 23 Cal. 16; *Dixon v. Clayville*, 44 Md. 573, 578; *English v. Carney*, 25 Mich. 178, 181; *McCurdy v. Clark*, 27 Id. 445, 348; *Parker v. Mercer*, 6 How. (Miss.) 320, 324; 38 Am. Dec. 438; *Cage v. Iler*, 5 Smedes & M. 410; 43 Am. Dec. 521; *Pugh v. Holt*, 27 Miss. 461; *Andrews v. Hobgood*, 1 Lea, 698; *Paris Exchange Bank v. Beard*, 49 Tex. 363; *Delespine v. Campbell*, 52 Id. 4; *Wilson v. Eigenbrodt*, 30 Minn. 4.

The authorities which hold that the notes should be paid in the order in which they were assigned do so upon the ground that the debt secured was the principal and the mortgage an accessory, and that the transfer of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay the part assigned as effectually

as it existed in the mortgage; and that no second assignment can divest the first assignee of his lien and preference.

The courts adhering to the doctrine that the notes should be paid in the order of their maturity say that the debt is the principal thing, and the mortgage to secure it is only an incident; that the assignment of the debt passes the mortgage without being referred to in the assignment; that "the assignee of the debt takes the security by the assignment, in the same condition and to the same extent it was held by the payee at the time of the assignment, as security for the debt assigned, and succeeds under it to all the rights of the assignor"; that the assignor, the payee, in the absence of a stipulation to the contrary, had the right to foreclose the mortgage when default should be made in the payment of the notes first falling due, and as each one should fall due, and satisfy them out of the proceeds in the order of their maturity, so far as the proceeds would extend, although there should not be enough to pay all; and that, therefore, inasmuch as the assignee, by the assignment of any one of the notes, succeeded to the rights which his assignor had, he has the right, in the event there is not enough to pay all, to be paid out of the mortgaged property so far as it will extend, according to the order in which his note stands in the line of maturity with the others secured by the mortgage; and that "the different installments in the mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable."

The reasons assigned for the two doctrines first mentioned are not convincing. While the notes were in the hands of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. He could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose: *Saunders v. McCarthy*, 8 Allen, 42; *Allen v. Kimball*, 23 Pick. 473; *Mathews v. Switzler*, 46 Mo. 301. If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference through the act of the mortgagee, and so might have the second or last in the same manner. The mortgagee being the owner of all the notes,

unrestricted by the mortgage, can give the preference in the appropriation of the proceeds to either of them, by virtue of his ownership and control over the entire mortgage debt; and the question of preference or right to priority in payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence the assignment of one of the notes could not, *ipso facto*, carry with it the right to be paid in preference to the other notes, because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment; for the condition on which the mortgagee could have exercised the power does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference, because the mortgagee could have given preference in the appropriation of payments when he owned all the notes.

The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them does not support the doctrine it is made to prove. To make the cases analogous, the mortgages to secure each note must bear the same date, and be executed, delivered, and filed for record, and recorded, at the same time, and the property mortgaged must be the same. In the latter case, the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be transferred to a third party it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature.

We do not think that either of the doctrines laid down by the two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage, executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally, or *pro rata*. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does

not change the mortgage, and make it any less security for any of the notes than it was before the assignment. The mortgage security, in following the transfer of the notes as an incident, does not pass by the assignment any further than it was an incident at the time the transfer was made. The holders of the notes, therefore, stand *æquile jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all.

The decree is affirmed.

MORTGAGE SECURING SEVERAL NOTES. — Where one mortgage secures two or more notes, the decree of foreclosure may provide that the proceeds be *pro rata* applied to the several notes: *Parker v. Mercer*, 6 How. (Miss.) 320; 38 Am. Dec. 458, and particularly note 440, 441; *Cage v. Iler*, 5 Smedes & M. 410; 43 Am. Dec. 521; *Fourth Nat. Bank's Appeal*, 123 Pa. St. 473; 10 Am. St. Rep. 538; *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399; 94 Am. Dec. 414. But there are numerous cases opposed to this rule of *pro rata* payment and satisfaction: *Grapengether v. Fejervary*, 9 Iowa, 163; 74 Am. Dec. 336, and particularly note 341; *Isett v. Lucas*, 17 Iowa, 503; 85 Am. Dec. 572; *Mitchell v. Loden*, 36 Mo. 526; 88 Am. Dec. 156; *State Bank v. Tweedy*, 8 Blackf. 447; 46 Am. Dec. 486, and note 489; *McClintic v. Wise*, 25 Gratt. 448; 18 Am. Rep. 694; compare *Bank of Napa v. Godfrey*, 77 Cal. 612.

MORTGAGE SECURING NOTE SUBSEQUENTLY EXECUTED. — Where, in a mortgage to secure advances, it was expressly stated that as mortgagor might need additional advances, any notes to the amount of three thousand dollars should form a part of the consideration of the mortgage, and be secured by it, notes for such amount, when executed according to the terms of the mortgage, are secured by it, and equally with the original debt: *Pillow v. Sentelle*, 49 Ark. 430.

SHARP v. STATE.

[51 ARKANSAS, 147.]

CRIMINAL LAW — WOUND AGGRAVATED BY IMPROPER TREATMENT. — One who inflicts upon another a wound calculated to injure or destroy life, and from which death ensues, may be convicted of manslaughter, though such wound became mortal through the improper treatment of the physician in charge, if the person wounded dies as the combined result of such wound and of such treatment.

CRIMINAL LAW — PROVINCE OF THE JUDGE. — The judge has a right, in a criminal prosecution, to interrogate the witness; but he has no right to usurp the place of the prosecuting attorney, and prescribe the order of the introduction of the witnesses, and become active in their examinations. Neither has the judge the right to assume the duties resting on the prisoner's counsel in the general conduct of the defense. He may, however, ask questions which the attorneys have a right to propound and fail to ask, when the answers to the same may tend to prove the guilt or the innocence of the accused.

JURY TRIAL. — A JUDGE SHOULD NOT EXPRESS OR INTIMATE ANY OPINION AS TO THE CREDIBILITY OF A WITNESS, or as to controverted facts. Under the constitution of Arkansas, a judge is expressly prohibited from charging the jury with respect to the facts.

JURY TRIAL — INVASION BY THE JUDGE OF THE PROVINCE OF THE JURY. — Where, in a criminal prosecution for murder, a witness testified that he was present at a rencounter between the deceased and another, and that he made no effort to stop their fighting, and the court then asked the witness, "Do you mean to say that you remained there, and saw these men fighting with knives, and did not interfere in any way to prevent it?" and defendant's attorney thereupon stated that the witness had not said that he saw them fighting with knives, and the judge responded, "The jury will be the judge of that. I am examining the witness, and you can object if you do not think it proper", and it was doubtful, from the evidence, whether the defendant had participated in the fight, — it was held that the language of the judge was prejudicial to the accused, because the jury might infer from it that the judge was of the opinion that the evidence proved that the defendant participated in the fight with knives, and thereby contributed to the killing of the deceased.

G. W. Murphy, for the appellant.

D. W. Jones, attorney-general, for the appellee.

BATTLE, J. Appellant and Jasper Dunkin were jointly indicted for murder in the first degree, were jointly tried, and were convicted of murder in the second degree. They moved for a new trial. During the pendency of the motion Dunkin died. The motion was denied, and Sharp appealed.

It is alleged in the indictment that the accused murdered Mike Martin by stabbing him with a knife. The evidence shows that Dunkin stabbed him, and that a physician was called in to treat his wound. Defendants introduced the testimony of experts for the purpose of proving that the wound was not mortal, and that the death of the deceased was caused by the maltreatment of the physician.

As to the responsibility for the death of Martin, the court instructed the jury, over the objection of defendants, as follows: "When one willfully and unlawfully inflicts upon another a wound which is not within itself mortal, yet if by improper treatment of such wound by the physician in charge it becomes mortal, and the person so wounded dies from such wound and the erroneous treatment of the same by such physician, the person inflicting such wound is criminally responsible for the death. . . . If you find, from the evidence in this case, that the defendants inflicted upon Mike Martin a mortal or dangerous wound with a knife, and you also find

that said wound was erroneously treated by the physician, and that said Martin died from said wound and such erroneous treatment of the same, you will find the defendants guilty of murder or manslaughter, according as the evidence may show."

Are these instructions erroneous? Chief Justice Bigelow, after a careful examination of the authorities upon this question in *Commonwealth v. Hackett*, 2 Allen, 141, said: "The well-established rule of the common law would seem to be, that if the wound was a dangerous wound,—that is, calculated to endanger or destroy life,—and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound, and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound: 1 Russell on Crimes, 7th Am. ed., 505; Roscoe's Crim. Ev., 3d ed., 703, 706; 3 Greenl. Ev., sec. 139; *Commonwealth v. Green*, 1 Ashm. 389; *Regina v. Haines*, 2 Car. & K. 368; *State v. Baker*, 1 Jones, 267; *Commonwealth v. McPike*, 3 Cush. 184; 50 Am. Dec. 727. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such a manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound, or its unskillful or improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men,

and the uncertainties attendant upon the treatment of bodily ailments and injuries, it would be easy, in many cases of homicide, to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment."

In *Regina v. Holland*, 2 Moody & R. 351, "it appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, amongst other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated." At the end of two weeks lock-jaw followed as the result of the wound, and caused his death. It was held that the prisoner was guilty of murder.

Mr. Greenleaf, in his work on evidence, says: "If death ensues from a wound, given in malice, but not in its nature mortal, but which, being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it; but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died."

Mr. Bishop, in his work on criminal law, says: "But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise. . . . But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound and the medical and surgical action jointly, the wound must clearly be regarded sufficiently a cause of the death. And the wound need not be even the concurrent cause; much less need it be the next proximate one; for if it is the cause of the cause, no more is required": 2 Bishop's Crim. Law, 7th ed., sec. 639; *State v. Morphy*, 33 Iowa, 270; 11 Am. Rep. 122; *Kee v. State*, 28 Ark. 155; *Smith v. State*, 50 Ark. 545; *Crum v. State*, 64 Miss. 1; 60 Am. Rep. 44.

The instructions were properly given.

The defendants asked and the court refused to give the following, and other instructions to the same effect, to the jury: "The right of self-defense is measured by the necessity, or

what appears to be the necessity, in the given case, and therefore if a person of great physical strength assaults a feeble one, without any manifest or apparent intent to kill him, but with much greater force and violence than he is able to resist by the mere use of his natural members, the person thus assaulted may, if he has no other reasonable way or means of avoiding or averting the violence and injury, avail himself of any reasonable instrument or means of defense in his possession or within his reach, and if, while defending himself therewith against such assault and injury, and not in a spirit of revenge, ill-will, wantonness, or recklessness, or for the purpose of unnecessarily injuring the assailant, he inflicts upon the assailant a wound or stab which is not mortal, but a person called as a surgeon, by performing upon it an unwarranted operation, renders it mortal, or makes an additional one which is mortal, and death results therefrom, he, the person assaulted, cannot be held criminally liable for the death or homicide."

The death of Dunkin makes it unnecessary for us to decide the question raised by this instruction. The evidence shows that appellant was present when deceased was stabbed, and prevented Dunkin from stabbing him the second time. He gave no active aid or assistance to Dunkin in the infliction of the wound. There was no positive evidence that he advised or encouraged it at the time it was done. The facts which implicated him, if any, preceded the conflict in which the wound was inflicted. In convicting him, the jury must have concluded that there was an understanding between Dunkin and Sharp to do some unlawful act, and that Dunkin, when proceeding according to the common plan, inflicted the wound. Under this state of facts, the instructions asked and refused could have been of no service to appellant.

All that is in them which could have been of any advantage to him was included in other instructions, which were given. For the court expressly told the jury that they could not convict both of the defendants, unless the evidence showed that they inflicted upon the deceased the wound of which he died, or that one inflicted the wound and the other was present and aided and assisted him therein, or was present and ready and consented to aid, abet, or assist; and that, if they believed, from the evidence, that the wound was not inflicted by Sharp, they must acquit him, unless they found, from the evidence, that he assisted the person who inflicted it by acting in con-

cert with him, or counseled or advised him to inflict it. If Dunkin was assaulted by the deceased, and to protect himself, through no spirit of revenge, ill-will, wantonness, or recklessness, or for the purpose of unnecessarily injuring his assailant, stabbed him, it was the duty of the jury, under these instructions, to have acquitted the appellant.

On the trial, one Woods testified that he saw the difficulty between Dunkin and the deceased; that he was talking with Dunkin, when deceased asked Dunkin where his (deceased's) wife was, and Dunkin replied he did not know. Deceased then said he, Dunkin, was a liar, and commenced striking at him. Dunkin retreated, and deceased followed. When they reached a corner of the room in which the difficulty occurred, Dunkin asked the deceased not to cut him. About this time Sharp came into the room and requested them to stop, and, they refusing to do so, he sprang forward and grabbed at them, or one of them, and Dunkin fled, the deceased and Sharp following; and as they went through the door, he, witness, saw a knife in the hands of the deceased, but did not see Sharp with any. Other witnesses had testified that they had seen Sharp and Dunkin with knives in their hands a short time before and after the deceased was wounded. Woods further testified that he made no effort to prevent or stop the fighting. After he had made this statement, and while he was testifying, the presiding judge asked him this question: "Do you mean to say that you remained there, and saw these men fighting with knives, and did not interfere in any way to prevent it?" Whereupon defendant's attorney stated that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness, and you can object if you don't think it proper." And the defendants excepted; and appellant now insists he was prejudiced by this question, in the manner in which it was asked, and by the remark made by the judge in response to his attorneys, and on that account should have a new trial.

The judge has the right, in a criminal prosecution, to interrogate the witnesses, but he has no right to usurp the place of the state's attorney, "and prescribe the order of introduction of the witnesses, and become active in their examination"; nor has he the right to assume the duties resting on the prisoner's counsel in the general conduct of the defense. He may ask questions which the attorneys had the right to propound

and failed to ask, when the answers to the same may tend to prove the guilt or innocence of the accused. It would be a reproach to the laws of the state if he was required to sit and see the guilty escape or the innocent suffer through a failure of parties, or their attorneys, to ask a witness a necessary question: *State v. Lee*, 80 N. C. 483; 1 Wharton on Evidence, sec. 496.

In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness, or as to controverted facts. For the jury are the sole judges of fact and the credibility of witnesses; and the constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the constitution, and would be a palpable violation of the organic law of the state.

In *McMinn v. Whelan*, 27 Cal. 300, a witness on cross-examination was interrogated in respect to her residence and business. Objection was made to this course of examination; the court overruled the objection, at the same time remarking that the witness was a woman of respectability. The appellant insisted that the remark of the judge was an irregularity of sufficient magnitude to authorize the reversal of the judgment of the court below. Mr. Justice Currey, in delivering the opinion of the court upon this question, said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may, on the one hand, support the character or testimony of a witness, or on the other, may destroy the same in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which

complaint is made, and though we do not impugn the expression as designed to aid the side of the plaintiff, we may say we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed."

In *People v. Williams*, 17 Cal. 146, the judge charged the jury that "the fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give the defendant any right to take his life. Our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes or licenses." In reference to this charge, the supreme court said: "The word 'victim,' in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proofs, even an equivocal expression coming from the judge may be fatal to the prisoner. When the deceased is referred to as a 'victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great, or even controlling, influence."

In *People v. Dick*, 34 Cal. 663, the judgment of the court below was reversed on account of the use of the following language in the charge to the jury: "The defendant is charged with having murdered, in this county, on or about the twelfth day of May, 1866, one S. M. Simpson. Now, the first ques-

tion for your decision is this: Was S. M. Simpson, on or about the fourteenth day of May, 1866, in this county, murdered? In determining that question, the court thinks you can have no hesitation whatever." In respect to this language, the court said: "We are of opinion, however, that the other portion of the charge noted is within the clause of the constitution which prohibits judges from charging juries upon matters of fact, and are unable to conceive of any state of facts under which, in view of that restriction, a judge can be allowed to address such language to a jury. . . . Whether wisely or not, the constitution has abrogated the rule of common law by which judges were allowed to express their opinions as to the facts in issue, or as to the weight of evidence. To weigh the evidence and find the facts is, in this state, the exclusive province of the jury; and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law."

The conviction of the appellant depended upon his participation in the wounding of the deceased. Upon this point the evidence was weak and unsatisfactory. When the judge said, "Do you mean to say that you remained there, and saw these men fighting with knives, and did not interfere to prevent it?" the jury might reasonably have inferred that "these men" referred to were the defendants, and that the judge was of the opinion they were concerned in the stabbing of the deceased; and when the defendant's attorneys stated that the witness had not said that he saw them fighting with knives, and the judge responded, "The jury will be the judge of that," they might reasonably have concluded that the men referred to by the judge in the question asked were the defendants, and that, in his opinion, they fought with knives, as they were selected to decide whether defendants were guilty or innocent of the killing of the deceased. In the midst of doubt as to what their verdict should be as to appellant, it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions which they were required to decide. It is therefore evident he did not have a trial according to law,—such as was guaranteed to him by the constitution of this state; and in this respect was prejudiced by the question and reply of the court. In so deciding, we do not mean to impute to the judge an improper motive. On the contrary, we are satisfied that the question was asked and the reply was made

with no intention to influence the jury or prejudice the defendants.

Judgment reversed, and a new trial granted.

JURY TRIAL — INVASION BY THE COURT OF THE PROVINCE OF THE JURY. — In the note to *State v. Whit*, 72 Am. Dec. 538-549, the matters upon which it is proper for the court to instruct the jury were treated at considerable length, and reference was incidentally made to remarks of the court, which, though not contained in its instructions, might be deemed to operate to the prejudice of one of the litigants, and therefore to entitle him to a new trial in the event of a verdict against him. The same subjects are thought worthy of additional consideration in the light which the most recent decisions throw upon them.

In England, in our national courts, and in the courts of many of the states of the American Union, the judge may, if he sees proper, advise the jury, not only by stating the evidence, but also by giving them the benefit of his advice and counsel concerning it. He may indicate the inferences which his own mind has drawn from such evidence, and may show in unmistakable language that, in his opinion, the verdict should be for the one side or the other. Whatever opinion the judge expresses to the jury cannot be reviewed as a matter of error in any appellate court, so long as no rule of law is incorrectly stated by him: *Lovejoy v. United States*, 128 U. S. 171; note to *State v. Whit*, 72 Am. Dec. 538-542; Thompson on Trials, secs. 2292-2294. The state in which a national court is held has no power, by its constitution or statutes, to limit the authority of the judge, and hence when the action is tried in one of the national courts it is immaterial that the constitution or statutes of the state declare in most explicit terms that the judge shall not indicate his opinion upon any question of fact: *Vicksburg and Meridian R. R. Co. v. Putnam*, 118 U. S. 545; *Nudd v. Burrows*, 91 Id. 426. Where, however, the judge indicates to the jury his conclusions upon any question of fact, he should also give them to understand that his views are not binding upon them, and that they may and ought, notwithstanding, to find such verdict as to them seems proper. In other words, all matters of fact must be ultimately submitted to the determination of the jury, though, before permitting them to make such determination, the court may address them upon the subject and give them its advice and opinion, and may even use language which must inevitably prejudice the one litigant or the other in the minds of the jury: *Sorenson v. Northern Pac. R. R. Co.*, 36 Fed. Rep. 166; *Rucker v. Wheeler*, 127 U. S. 85; *Lovejoy v. United States*, 128 Id. 171. Thus in New Jersey the court refused to set aside a verdict where the judge on the trial of the defendant for occasioning an abortion charged the jury that it was their right to decide all disputed questions of fact, and to give the defendant the benefit of every doubt, and also employed the following language: "There is nothing more impressive than the apparent heartlessness of the defendant in talking the way she did about this unfortunate affair. Her absence of solicitude to the girl's condition, her absence of effort in helping the state to detect the crime, — such facts as these are important for your consideration, and from them you can draw strong inferences one way or the other": *Engle v. State*, 50 N. J. L. 272.

The constitutions of several of the states declare that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." In other states, provisions of similar import are to be

found in their statutes: Thompson on Trials, sec. 2280; Ark. Const., art. 7, sec. 23; Nev. Const., art. 6, sec. 12; S. C. Const., art. 4, sec. 26; Tenn. Const., art. 6, sec. 9; Cal. Const., art. 6, sec. 19. Wherever these constitutional or statutory provisions are in force, the most ceaseless care and diligence are required to enable the court to instruct the jury and to make rulings on the admission or rejection of evidence without employing some expression which has more or less bearing upon some issue of fact, or more or less tendency to augment or diminish the effect of the testimony of some witness. The court may, by the express terms of these provisions, "state the testimony." This statement, when made, should be without color or emphasis. The judge should not employ any language or artifice from which the jury may know that he gives more credence to one part of the testimony than to another. The statement should be as free from bias as would the reading of the same evidence by a stenographer from his notes. As long as the judge merely states or reviews the evidence as a whole, or repeats that bearing on some particular question, he does not give his opinion nor furnish any ground for exception: *Tift v. Jones*, 77 Ga. 181; *Murchie v. Gates*, 78 Mo. 300. He may also show wherein the evidence relating to any question conflicts, if in fact such conflict exists: *Commonwealth v. Barry*, 9 Allen, 273; *State v. Dixon*, 75 N. C. 275; *People v. Flynn*, 73 Cal. 511; and may tell the jury that there is only one piece of evidence upon a certain subject, and what such evidence is, and further, that "there can be no misunderstanding regarding it," if there is no doubt that such evidence was given, and if the language used by the witness was so clear that there can be no two opinions as to its signification: *People v. Perry*, 65 Id. 568. The judge may also refer to particular evidence as tending to prove the fact in dispute: *Beattie v. Hill*, 60 Mo. 72; *People v. Vasquez*, 49 Cal. 560; *Morris v. Lachman*, 68 Id. 109; but he must not say that such evidence shows the existence of any fact, nor proceed any further than merely to indicate that the evidence is relevant as tending to establish some proposition involved in the controversy: *People v. Casey*, 65 Id. 260.

Prohibitions against charging juries upon matters of fact are obviously designed to prevent courts from becoming participants, as it were, in the settlement of controverted questions of fact; and if at the trial it turns out that there is no controversy upon some or upon all of the issues, there is no reason for the prohibition, and no occasion for its enforcement. Hence if there are undisputed facts, or facts in relation to which there is no conflict in the evidence, the judge in his charge may properly assume the existence of those facts: *Hooks v. Fricks*, 75 Ga. 715; *Carter v. Chambers*, 79 Ala. 223; *Fields v. Wabash etc. R'y Co.*, 80 Mo. 203.

Though the evidence be without conflict, it may not inevitably tend to establish any particular fact. The language of the witness may be susceptible of two or more interpretations, or the fact testified to may be such that the jury may or may not draw any particular inference or conclusion therefrom, though they may give full credence to the testimony of the witness. In neither case must the court interpose its views. It must not undertake to interpret the language of the witness, if it be such as to need interpretation: *Drewis v. Woods*, 71 Wis. 329; *Prairie State v. Dalg*, 70 Ill. 52; nor can the court properly tell the jury what inference they should draw from certain undisputed testimony, where it is possible for such testimony to be true and the inference to be untrue: *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63. An extreme illustration of this last proposition is to be found in *Stanley v. Montgomery*, 102 Id. 102. The question in that case was, whether

the defendant had given his wife cause for divorce. The instruction of the trial court and the opinion of the appellate court thereon sufficiently appear from the following quotation: "The said instruction No. 6, one of the conditions of the bond being that the said John Stanley should not, by his misconduct, give the plaintiff a legal cause for a divorce, was as follows: 'If you find that he (the defendant), after their said marriage, sought the society of prostitutes and women of bad repute for chastity, or that he went into a private bedroom with a woman of bad repute for chastity, or a prostitute, in the night-time, and remained there for some time, no one else being present, then, and in either event, your verdict should be for the plaintiff.' This was clearly wrong. There was no breach of the condition now under consideration, unless the said John Stanley, by his misconduct, had given the plaintiff a legal cause for a divorce. In a suit for divorce it would be competent for the plaintiff to prove that the defendant sought the society of prostitutes, and the jury might make the proper inferences from such proof, but it would be error if the court should instruct the jury that they were bound on such proof to find a verdict for the plaintiff. That would be imposing upon the jury the inference made by the court, and it would deprive the jury of their right to make the necessary inferences from the facts proved. So, in such a case, it would be proper to prove that the defendant had occupied a room alone with a prostitute at night, and perhaps that proof would authorize the inference that adultery had been committed. But it would be the privilege of the jury to make the inference, and it would be error to instruct the jury that on such proof they were bound to find that adultery had been committed. In the present case, when the court charged the jury that their verdict should be for the plaintiff, if they should find that John Stanley had been seeking the society of prostitutes, or had been in a room at night alone with a prostitute, the court determined that such proof required the inference to be made that the plaintiff had a cause of divorce. The court, therefore, interfered with the province of the jury, which is to determine for themselves what are the proper inferences to be made from the evidence." Another and perhaps equally extreme case is *Farley v. State*, 63 Miss. 333. The question there was, whether certain bitters were spirituous liquor or not; and the judgment was reversed, because the court told the jury that evidence that the witness "was made drunk by the use of the bitters is proof that it was spirituous liquors." Where a court was requested to instruct a jury that "the fact that the plaintiff's daughter was suffering, at the time of her alleged seduction, with a venereal disease, if you find such fact to exist, would, if not explained, in itself be sufficient evidence of unchastity to prevent a recovery in this action," it was held that the instruction was properly refused, "for the reason that it invades the province of the jury": *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822.

As before intimated, the prohibition we are considering may be violated either in the charge of the court to the jury, or in some expression made at some other stage of the trial. In either event, the error of the court will consist, — 1. In some statement which shows the inclination of the court to be in favor of the one party or the other, by evincing its conclusion upon the merits of the case, or some sympathy for or aversion against a party or a cause of action or of defense; 2. By assuming some fact to exist upon which there is no evidence, or upon which the evidence is conflicting; 3. By intimating to the jury that weight should be given to certain evidence, as where something is said either to cast discredit upon or to give additional weight to some witness or to some class of evidence.

There is no doubt that a judge must not, at any stage of the trial, in the presence of the jury, employ any language from which they may understand what conclusion he has reached upon controverted questions of fact: *State v. Harkin*, 7 Nev. 377; *Fuhrman v. Mayor*, 54 Ala. 263. The only question is in the application of the rule. Some illustrations of its application will be given from the adjudged cases. If the question is, whether a party has, either in person or through his servant or agent, been guilty of negligence, and there is a dispute regarding the facts which are claimed to be negligent, or if, while the facts are not disputed, different persons may draw different conclusions from these facts, as to whether or not they establish the charge of negligence, the court must not intimate that negligence has or has not been proved, nor assume its existence or non-existence in its instruction: *Missouri Pac. R'y v. Christmas*, 65 Tex. 369; *Brady v. Burlington etc. R'y Co.*, 72 Iowa, 53; *Schmidt v. McGill*, 120 Pa. St. 405; 6 Am. St. Rep. 713; *Costley v. Galveston City R'y Co.*, 70 Tex. 112. In *Weiderkind v. Tuolumne County Water Co.*, 65 Cal. 431, the question at issue was, whether the defendant had been negligent or not in the management of a dam maintained by it, and the instruction given by the trial court, and condemned by the supreme court, together with an opinion of the latter court thereon, are shown in the following extracts from the opinion: "We think the court overstepped the limit prescribed by section 19, article 6, of the constitution, when it instructed the jury: 'If you find, from the evidence, that the defendant did not have sufficient gates to let out the water, so as to prevent any break that occurred below the top of the dam from being enlarged by the continual flow of the waters through it, then said dam is insufficiently and negligently constructed. It should have had gates sufficient to let all the water out by degrees, so as to prevent a flood below by a sudden breakage of the dam.' It was proper to instruct the jury as to the degree of care and vigilance which the law devolved on the defendant in the construction and maintenance of its dam, and that if it neglected or failed to exercise that degree of care and vigilance, it would be liable for such damages as any one might suffer from the dam's breaking away. But when the court went beyond that, and instructed the jury that the dam was 'insufficiently and negligently constructed,' unless it had gates sufficient for a certain purpose, it charged with respect to a matter of fact. The court might have as well charged them that if the dam were not of certain dimensions, or constructed of a particular kind of material, it was insufficiently and negligently constructed. The defendant had a right to have the opinion of the jury on those questions. And we think the court erred in charging that 'it was the duty of the defendant to constantly examine said dam during the season of freshets.' That might depend on circumstances, and should have been left to the jury." So in *St. Louis, A., & T. R'y Co. v. Burns*, 71 Tex. 479, the trial court was adjudged to have committed an error in instructing the jury that what would be a reasonable time for a man to alight from a train would not be a reasonable time for an aged lady, on the ground that what was a reasonable time was, under the circumstances, wholly a matter of fact "for the consideration and determination of the jury, and whether more time was required for her, by reason of age, sex, or infirmity, than for a person of the other sex, whose energy was unimpaired, should have been left to their decision."

The following instructions have been adjudged to violate the prohibition under consideration: An instruction which virtually assumed that the statement made by the defendant was true as a matter of fact, and informed the jury that a payment referred to by the defendant in his evidence was, as the

court understood it, the completion of a contract: *Vukcevic v. Skinner*, 77 Cal. 239; an instruction that certain facts stated by defendant might reduce the crime to manslaughter when there was a claim that he acted in self-defense: *State v. Turner*, 29 S. C. 34; 13 Am. St. Rep. 706; an instruction that it is a rule of law that no person can accept without objection the services of another without being liable to pay their reasonable value, and that the judge can see no reason why this rule should not be applied in the case under consideration: *Richardson v. Hoyt*, 60 Iowa, 38; an instruction on the trial of an indictment for murder, where one count of the indictment charged the defendant as a principal, and the other as aiding and abetting the murder, that the defendant was guilty as principal or not at all, there being evidence to show that he might have been present aiding and abetting, but not as principal: *Lovejoy v. State*, 82 Ga. 87; an instruction that "if the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might, and probably would, have been the result of any disease with which the deceased was afflicted at the time of the violence." The reasons inducing the condemnation of this instruction, in connection with the facts of the case in which it was given, were thus stated in the appellate court: "The charge is quoted from an approved text-writer, and in a proper case may be accepted as sound law. But in this case it was insisted, and there was evidence tending to show, that the only blows given to the deceased by the prisoner were given with the fists only, and were given in self-defense; also, that the deceased died of disease produced by injuries received otherwise than at the hands of defendant. It might, therefore, be that the 'violence of the prisoner' was not unlawful. If it was not, then no guilt would flow from it, even if death had resulted from such violence. It follows, under these circumstances, that this charge may have been misleading to the jury, and from it they may have assumed the guilt of the defendant, when with a proper modification they would not have done so. Instructions should not directly or indirectly assume or hypothetically suggest the guilt of the defendant": *People v. Lanagan*, 81 Cal. 142; citing *People v. Williams*, 17 Id. 142; *People v. Hurley*, 57 Id. 145.

If a prisoner on trial makes a statement, and the judge at its conclusion asks him whether he meant to deny the testimony of a witness, this question is improper, unless it was intended simply for the purpose of calling the prisoner's attention in a friendly way to some omission in his statement, and allowing him an opportunity to supply such omission, if he saw proper: *Robinson v. State*, 82 Ga. 535. On a trial for murder, in which the defense was that the death was accidental, and that no crime had been committed, the judge in his charge stated that the evidence connecting the prisoner with the crime was circumstantial, and was not equivalent to that of two witnesses, and therefore was not sufficient to justify a verdict of murder in the first degree. It was held that this language could not be properly construed as an intimation to the jury that in the opinion of the judge the circumstantial evidence which had been received connected the defendant with the commission of the crime, and justified his conviction, though of some grade of offense less than that of murder in the first degree: *State v. Coffee*, 56 Conn. 390.

The judge must not place himself in an attitude of hostility to the law or to the parties, and while stating the law correctly, substantially nullify his statement by indicating his opinion of its justice or injustice. If, under the law, the plaintiff has a good cause of action, the judge should not for any reason tell the jury that the action ought not to have been brought: *Ludden*

v. *Clemons*, 16 Neb. 506. If it is the law that certain circumstances cannot properly be taken into consideration by the jury in estimating the damages to be awarded to the plaintiff, the judge should not express his regrets that the law is as he finds it, and indicate that he esteems it a great hardship to the plaintiff that the jury cannot allow him damages, to which the decision of the higher court maintains he is not entitled: *McFadden v. Reynolds*, Pa., Nov., 1887. The fact that the judge repeats the same legal proposition many times in his charge, as where he seven times states to the jury that the evidence, to impeach a written instrument on the ground of fraud, accident, or mistake, must be precise and indubitable, cannot be successfully complained of as error: *Murry v. New York etc. R'y Co.*, 103 Pa. St. 37. While the court ought not to do anything toward or with relation of either of the parties contributing to prejudice of him or his case in the minds of the jury, yet if a party has wantonly misbehaved during the trial, he cannot avoid a verdict against him upon the ground that he was notified by the judge, in the presence of the jury, that he must show cause why he should not be attached for contempt of court: *Bowden v. Bailes*, 101 N. C. 612.

A class of defenses may be so frequently employed in criminal prosecutions as to warrant a suspicion that they are resorted to for unworthy purposes, and supported by perjury and the subornation of perjury. Where this is the case there is a somewhat natural inclination upon the part of the judges to give some warning with respect to the character of the defense, and the means which are sometimes employed to support it. A familiar illustration of this is the defense of *alibi*. In *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, Chief Justice Shaw, in his charge to the jury, after explaining the nature of this defense, said: "This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence." Following the lead of this eminent jurist, other judges have undertaken to warn juries against the same defense. Thus in *People v. Wong Ah Foo*, 69 Cal. 180, an instruction was complained of which had been given in the following words: "Now, in determining that fact, gentlemen, I instruct you that evidence to establish an *alibi*, like any other evidence, may be open to special observation; persons may perhaps fabricate it with greater hopes of success or less fear of punishment than most other kinds of evidence, and honest witnesses often mistake dates and periods of time and identity of people, and other things about which they testify." The instruction was defended in an opinion written by Commissioner Foote, as follows: "Upon a close examination of the whole charge, including the part quoted, and giving to it an unstrained interpretation, we do not perceive that the court charged the jury upon the weight of evidence. It is undoubtedly true, as a matter of fact, that untruthful witnesses may fabricate anything, and testimony of an *alibi* may perhaps be more easily fabricated than most other kinds, and those facts are within the knowledge of most persons of ordinary understanding and experience. And in support of this theory we have the authority of eminent jurists. It is perfectly proper for a court, where a son testifies in behalf of a father, to admit the evidence to the jury of their relationship, and, alluding to such a fact as being in evidence, to charge the jury that they may consult their

general knowledge and experience in life as to whether or not a son would perhaps be apt to favor his father in giving his testimony, and the like, this being in the nature of an observation upon a witness and his relationship to the accused: 1 Bishop's Crim. Proc., sec. 982. And in the present instance we do not see how the jury could have understood that they were to lay less stress upon the evidence of *alibi* than any other testimony, for in fact they were expressly informed that 'evidence to establish an *alibi*, like any other evidence, may be open to special observation,' and these special observations did not go to the length of informing the jury positively that such evidence was less reliable than other testimony in the present case, but informed them simply of the legal infirmities which were 'perhaps' inherent in such testimony, leaving to the jury fully and exclusively as their province to determine its truth or falsity. And viewed in the light of good sense, we do not see that the language complained of went beyond a reasonable and fair latitude of observation permissible from the judge to the jury: 1 Bishop's Crim. Proc., secs. 982, 1064."

In another case in the same state it appeared that the jury had been told: "The fact, however, which experience has shown, that an *alibi*, as a defense, is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance, — these are considerations attendant upon this defense which call for some special suggestion on the part of the court. These are, while you are not to hesitate at giving this, as a defense, full weight, — that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitles the defendant to an acquittal, — still you are to scrutinize the testimony offered in the support of an *alibi* with care, that you may be satisfied that a fabricated defense is not being imposed upon you." This instruction was not commented upon at any considerable length by the appellate court. The commissioner writing the opinion contented himself with referring to the opinion in the case of *People v. Wong Ah Foo*, hereinbefore quoted, and declared that the instruction was sustainable upon the reasons stated in that opinion: *People v. See Yam*, 69 Cal. 552.

Certainly the only thing which can be said in favor of these instructions upon the defense of *alibi* is that urged by the court, namely, that they did not cast discredit upon the defense nor incite the jury to regard it with suspicion. This defense of these instructions was not ingenuous. They were manifestly not in favor of the defense, nor were they meaningless. Any sensible jury must have understood them as a note of warning, as significant as if the judge had said: "Here, gentlemen, is the pitfall into which many jurors have fallen, and which you will not escape except by the exercise of unusual care. Here is the point where incredulity is a virtue."

Undoubtedly one accused of a crime is strongly tempted to defend himself by whatever evidence he can summon to his aid, and instances have occurred in which every available defense has been supported by questionable methods, and even by the suppression, perversion, and fabrication of evidence. This is not more true of the defense of *alibi* than of other defenses. Thus self-defense, which is an especially meritorious defense, is also one which is most likely to be supported by testimony which is not only false, but is particularly difficult to disprove, for while the slayer remains to testify in his own behalf, his act has sealed the lips of his victim. Nevertheless, this defense

would surely be improperly discredited if the presiding judge should substantially charge the jury that the result of his observation and experience had led him to the conviction that murdering men, and then testifying and procuring others to testify that the act was done in self-defense, had become a very frequent occurrence, and that they must view with incredulity all evidence tending to establish a like defense in the case before them.

The vice of these instructions upon any particular defense extends beyond the language to be found in them, for the mere giving of them indicates to the jurors that the judge has considered the defense, thinks illy of it, and warns them not to seriously regard it.

It ought to be remembered that the remarks of Judge Shaw in the Webster case were *dicta*. The defendant had not undertaken to prove that he was at a place different from that at which the crime was committed at the time of its probable commission. If there was any question of *alibi*, it was of an *alibi* on the part of the deceased, — a contention that he had been seen alive, and walking upon the streets after the time at which the prosecution insisted that he had been murdered by the accused. The propriety of Judge Shaw's remarks was not questioned at any subsequent stage of the case; nor could it have been questioned, except to criticise them for irrelevancy. The defense of *alibi* had not been interposed, and the aversion shown to it could not have prejudiced the defendant.

Whenever an instruction has been given which clearly casts discredit upon the defense of *alibi*, and it appeared possible that it could have prejudiced the accused, and aided in his conviction, the appellate court has granted him a new trial. The courts have even condemned remarks upon this defense, which, while not discrediting it in express terms, have implied that the judge did not regard it with favor. Thus in *Walker v. State*, 37 Tex. 387, where it appeared that the judge had remarked to the jury that "an *alibi* is a species of defense often set up in criminal cases, and one which seems to figure somewhat in this," the appellate court remarked: "It is believed that this portion of the learned judge's charge, as well as others heretofore referred to, were the result of haste and excitement, which almost always attends trials for offenses of so grave a character as the one now under consideration. But it is the duty of the appellate court to act with more deliberation, and correct such errors whenever they may occur. The peculiar language of the charge in regard to the defense of an *alibi* is well calculated to convey to the minds of the jury the impression that the court regarded that particular defense as a pretense without much foundation in truth."

In *Albin v. State*, 63 Ind. 598, the trial court instructed the jury as follows: "The defendant has introduced some evidence for the purpose of showing that he could not have been present at the place where the alleged crime was committed at the time when it was committed, because of his presence at another place at the time of the commission of the offense. This is usually called an *alibi*. This defense is liable to great abuse, growing out of the ease with which it may be fabricated, and difficulty with which such fabrications can be detected. It often happens, in the recollection of ordinary events, that the day may become to be mistaken for another, as being confounded by the preceding or following. Thus it has occurred that the assignment of events, true in themselves, of one day, have been confounded with another. The evidence offered upon this subject should be carefully compared with the other evidence given in the cause, and you should ascertain how it corresponds with the account which the accused himself has given of his whereabouts on that day."

The defendant, having been convicted, appealed to the supreme court, where this instruction was condemned, and the rules applicable to the defense of *alibi* thus stated: "It cannot be held as a principle of law that the defense of *alibi* is liable to great abuse, growing out of the ease with which it may be fabricated, and the difficulty of detecting the fabrication. This is not always true of such a defense. Sometimes the evidence which tends to prove an *alibi* is open, clear, and direct, without any of the signs of fabrication about it. Sometimes, doubtless, it is open to suspicion. So may evidence be which tends to prove any other fact. Law is fixed and uniform; it cannot be one thing in one case, and another thing in another case, as evidence may be. We know of no rule of law which attaches a suspicion to or fixes a blemish upon evidence tending to prove an *alibi*, any more than it does upon evidence tending to prove any other fact. What creates suspicion against or marks evidence with a blemish is a question of fact, and not of law; and as the court must instruct the jury upon questions of law, and not of fact, we think the court erred in giving the instruction complained of." This is doubtless a correct expression of the law upon this subject. Where the judge is forbidden to express his views upon questions of fact, or regarding the credibility of witnesses, he is necessarily inhibited from criticizing any particular defense or cause of action, unless it be when proved insufficient in law. Therefore, instructions respecting the defense of an *alibi* cannot be sustained, if their natural tendency is to prejudice the jurors against it: *French v. State*, 12 Ind. 670; *Slater v. State*, 56 Id. 378; *Kaufman v. State*, 49 Id. 248; *People v. Kelly*, 42 Hun, 295; *Walker v. State*, 37 Tex. 367; *Albin v. State*, 63 Ind. 598.

An instruction should not be based upon supposed facts of which there is no evidence, as where the jury are told that if they believed that employees had testified under a fear of losing their employment, such fact may be taken into consideration in weighing their evidence, there being nothing in the testimony to suggest the presence of such a fear in the minds of the witnesses: *St. Louis etc. R. R. Co. v. Huggins*, 20 Ill. App. 639; or where the court stated that the jury may take the fact of an employee being around an employer's store as evidence of the former's willingness to perform services, when there was no evidence of his being around such store: *Jones v. Field*, 83 Ala. 445. Instructions of this character are vicious, independently of the prohibitions now under consideration, because they invite the jury to act upon evidence which is not before them, and which may not exist.

If there is a disputed question of fact, the judge must not assume that such question has been settled one way or the other by the evidence. To do this would be to pass upon the credibility of the respective witnesses, and this is especially the province of the jury; and any invasion of it by the court, however slight, must lead to a new trial at the instance of the party injured: *Finch v. Bergins*, 89 Ind. 360; *Carpenter v. Joliet Bank*, 119 Ill. 352; *Shaver McCarthy*, 110 Pa. St. 339; *Weybright v. Fleming*, 40 Ohio St. 32. If evidence has been received which is competent and material, the court must never instruct the jury to disregard it: *Bressler v. People*, 117 Ill. 422.

There are many circumstances which may lead the jury to weigh the testimony of a certain witness with caution, or to disregard it altogether, as where the witness is a party in interest, or evinces a bias or prejudice for or against some of the parties in interest, or where his character is impeached, his testimony contradicted by a great number of witnesses, or from all the circumstances of the case seems improbable, or where it appears to the satisfaction of the jury that the witness has willfully testified falsely relative to some

material fact, but there is nothing to show whether the other parts of the testimony are true or false. In some of the states it is doubtful whether the court has a right to call attention of the jury to the circumstances which would seem to discredit the testimony of the witnesses. In Kentucky it is regarded as improper to make any suggestion to the jury concerning the credibility of witnesses. In one instance, where it appeared that the jury had been told that they were the judges of the weight of the testimony and credibility of the witnesses, it was said that such an instruction ought never to be given, because it might be taken by the jury "as an intimation by the court that some of the witnesses were not entitled to credit, and that some of the testimony was without weight": *Smith v. Commonwealth*, Ky., April, 1888. The jury may, doubtless, in determining the effect which they will award to the evidence of a witness, consider his interest in the result of the litigation; and perhaps the court may and ought to tell them that they may do so. Any instruction on this subject, however, must be very cautiously drawn, and kept free from any suggestion that, as a matter of law, less force is to be given to the evidence of an interested witness than of one who is disinterested: *Woollen v. Whitacre*, 91 Ind. 502. Therefore, the following instructions have been adjudged erroneous: "The weight which you give the testimony of a witness depends upon the interest which such witness may have in the result of your verdict. You therefore give such effect and force to the testimony of the plaintiff and defendant as you think would be proper in view of what may be at stake to the plaintiff and to the defendant": *Dodd v. Moore*, 91 Id. 525. "The evidence of parties to the action, and those related to them, as their sons and daughters, is not entitled to as much weight as the evidence of disinterested witnesses": *Nelson v. Vorce*, 55 Id. 458.

Though a witness has willfully sworn falsely respecting some material fact, the court should not instruct the jury that they must disregard his statements concerning a different fact: *Frierson v. Galbraith*, 12 Lea, 129; but the jury may be instructed that if they believe a witness willfully testified falsely in respect to any material fact, they may, if they think proper, reject his entire testimony: *State v. Hickam*, 95 Mo. 322; 6 Am. St. Rep. 54; *Evans v. St. Louis, Iron Mountain etc. R'y Co.*, 16 Mo. App. 522; *Fath v. Hake*, 16 Id. 537; *Barney v. Dudley*, 40 Kan. 247; *Freeman v. Easty*, 117 Ill. 317. If the instruction omits the word "willfully" in connection with the word "falsely," it is erroneous, except in California, where the omission of this word is sanctioned by the Code of Civil Procedure: *People v. Treadwell*, 69 Cal. 226. The rule in this state, as prescribed by the code, differs from that in other states in this further respect, that in California the jury must be told that a witness false in one part of his testimony is to be distrusted in others, while in other states they should be instructed that a witness willfully false in one part of his testimony may be distrusted in other parts: *White v. Disher*, 67 Id. 402.

The testimony of one of the parties may be spoken of as uncorroborated; and where one witness is contradicted by three, the jury may be told that if all the witnesses are of equal credibility, the party in whose favor the three testified has shown by a fair preponderance of proof that the facts are as they have stated: *Lillibridge v. Barber*, 55 Conn. 366. If one of the parties has attempted to impeach a witness, the jury may be told that they should not disregard his testimony, if he has given a fair, honest, and candid statement: *McCasland v. Kimberlin*, 100 Ind. 121. The jury may be instructed to disregard the testimony of experts, if they deem it unreasonable: *St. Louis v.*

Rankin, 95 Mo. 189; but they should not be informed that such evidence should be received and weighed with great caution: *Atchison etc. R. R. Co. v. Thul*, 32 Kan. 255; 49 Am. Rep. 484; nor that direct evidence of the fact of the execution of a writing is entitled to greater weight than the opinion of experts as to the genuineness of a signature: *Buxley v. Burton*, 92 N. C. 479.

In Illinois and Indiana, it is improper to instruct the jury regarding the weight to be given to oral admissions testified to have been made by one of the parties, or to caution the jury that admissions are liable to be misunderstood or incorrectly remembered or repeated: *Lewis v. Christie*, 99 Ind. 377; *Zenoe v. Johnson*, 107 Id. 69; *Wickersham v. Beera*, 20 Ill. App. 243. In Wisconsin, on the other hand, the court may properly tell the jury "that all admissions made to third and disinterested parties are the weakest kind of evidence that can be produced": *Haven v. Markstrum*, 67 Wis. 493; *Nash v. Hoxie*, 59 Id. 884.

Where there is any conflict between witnesses, the jury must be left free to decide which they will believe; and this freedom does not consist in their being permitted to disagree with the court. They must not know what the court's views are upon the subject. Any instruction which, in effect, charges upon the weight of the evidence or the credibility of witnesses is highly improper: *Lampe v. Kennedy*, 60 Wis. 110. The amount of credit to be given a witness is wholly a question for the jury: *Mechelke v. Bramer*, 59 Id. 57. Hence it is error for the court to instruct the jury that "the law presumes that a witness, in his statement under oath, spoke the truth": *Stitz v. Keath*, 85 Ala. 465; or that certain concurring badges of fraud, which are specifically enumerated, taken together, raise a violent presumption of a secret trust: *Shealy v. Edwards*, 75 Id. 411; or that "the opinion of witnesses whose attention has been particularly called to an alleged insane person, who were familiarly acquainted with him and the operations of his mind, is ordinarily entitled to greater weight than that of witnesses of equal capacity whose opportunities of forming an opinion were more limited": *Fuhoider v. Ingels*, 87 Ind. 414. So, also, it is erroneous for the court, after referring to certain statements in the evidence of the defendant, to charge the jury that they may disregard such statements, if they "find, from evidence or acts or conduct of the defendant, that his actions speak louder than the words thus testified to by him": *Wilkinson v. Searcy*, 76 Ala. 176. If the court instructs the jury on the weight of evidence, the error is not rendered innocuous by supplementing it by the statement, "The jury are the exclusive judges of the weight of the evidence": *Shorb v. Kinsie*, 100 Ind. 429. As, however, in ruling upon the admissibility of evidence, and controlling the cross-examination of witnesses, the judge must necessarily make allusions to the testimony already received, any evil effect which might possibly result therefrom will be regarded, in the appellate court, as having been obviated if the jurors are told that they are the judges of the weight of the evidence and of the credibility of the witnesses. "Owing to the regard which is paid by jurors to the opinion of the judge, he should use great caution in expressing his opinion on any question which it is the province of the jury to determine. But every unguarded expression of the judge, in stating reasons to counsel for his rulings, cannot be treated as a ground for granting a new trial. To do so would be to greatly embarrass the administration of justice": *Birmingham F. I. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598.

The rule that the jury are the sole judges of the credibility of witnesses, and that the court must not seek or influence their judgment in this respect,

is often unconsciously violated in instructions which assume certain facts to be established or disproved, when so to do is to assume that some witness is to be believed or disbelieved. Remarks of the court, made in the presence of the jury during the progress of the case, may also, either intentionally or unintentionally, infringe the rule, and entitle the losing party to have a verdict to which they may have contributed set aside. At no time should the court, in the presence of the jury, make any remark which may tend to enhance or diminish the importance of any witness or any item of evidence. The character, or culture, or official or social position of the witness should not be referred to; and if any reference is made to it which may have influenced the jury, the verdict will be vacated: *McMinn v. Wheelan*, 27 Cal. 300; *Crutchfield v. Richmond*, 76 N. C. 320; *Commonwealth v. Barry*, 9 Allen, 276. In the case last referred to, all of the witnesses were policemen. The defendant's counsel having, in his argument to the jury, commented with some severity upon their testimony, as the testimony of policemen, the judge, in his charge, told the jury "that the same rules were applicable to policemen as to all other witnesses in determining the credit to be given to their testimony; that in very many cases which had been tried at the present term of the court, policemen had been the principal witnesses, and he thought that the jury would agree with him in his opinion that, in all cases, they had manifestly great intelligence, and testified with apparent candor and impartiality." This charge was condemned on appeal, among other reasons, upon the ground that it was an invasion of the province of the jury, in indicating to them the credit to be given to testimony of certain witnesses.

It is also improper for a judge to discuss evidence either sneeringly or in a manner otherwise tending to discredit it, as where, after evidence had been given of the finding of monuments of an old survey, he said, "It is not to be expected that the monuments thus made on the ground are now to be found": *Cross v. Tyrone Min. and Mfg. Co.*, 121 Pa. St. 387; or where, after evidence had been given of the making of a memorandum at the time of the transaction, from which the witness purported to testify, the judge spoke in a manner from which the jury might well infer that he doubted the making of the memorandum at the time testified to by the witness: *Valley Lumber Co. v. Smith*, 71 Wis. 304; 5 Am. St. Rep. 216. If a witness is entirely unimpeached and uncontradicted, and his testimony is not discredited by anything in the case, it may be proper for the court to instruct the jury that they should accept the testimony of such witness. Such an instruction is no more than telling the jury that they must find according to the uncontradicted evidence, unless such evidence was discredited in some way: *Engmann v. Immel*, 59 Wis. 249. It is evident, however, that such an instruction can only be given when there is no circumstance whatever that the jury ought to consider in estimating the credibility of the witness, other than that of his being unimpeached and uncontradicted. In *State v. Mallwood*, 75 N. C. 104, the judge instructed the jury "that they were bound to believe a witness, unless he was impeached either by the testimony of another witness or by some one fact or circumstances in the case." This instruction was considered erroneous and misleading in the case in which it was given, "because there were circumstances which the jury should have considered in estimating the credit to be given to the witness, and which, so far as appears, were not presented to the jury in that light, so as to explain or qualify the expression complained of." In a criminal prosecution the judge employed this language: "Now, do you believe the witnesses? It is not a question as to their veracity.

I have heard no evidence against their veracity, but counsel argues that they are mistaken." This was held not to be error, there being in fact no effort to impeach the witnesses. But in the same case, there being a conflict between the testimony of the accused and that of an unimpeached witness, the court told the jury that the unimpeached witness having testified to a material fact, it was not probable that he was mistaken, and that if defendant had willfully misstated that one fact, it would be safe to conclude that he would make other false statements, it was held that this was an invasion of the province of the jury, and entitled the defendant to a new trial: *State v. Jacob*, 30 S. O. 131; *post*, p. 897.

DUGGER v. WRIGHT.

[51 ARKANSAS, 232.]

SURETIES. — WHERE THERE ARE TWO SETS OF SURETIES OF AN EXECUTOR OR ADMINISTRATOR upon bonds given at different times, both sets are answerable for breaches committed prior to the execution of the second bond.

CONTRIBUTION AMONG SURETIES. — Where there are two or more sureties for the same principal debtor and for the same obligation, whether by the same or different instruments, they are co-sureties, and as between themselves are under obligation to equalize their common burden.

ADMINISTRATOR, HEIRS AS SURETIES OF. — IF HEIRS OR DISTRIBUTORS ARE ALSO SURETIES ON THE BOND OF EXECUTORS OR ADMINISTRATORS, and they bring an action against other sureties of the same executors or administrators, though upon a different bond, the latter have an equitable defense to the extent of the amount which they could claim by way of contribution against the plaintiffs as their co-sureties.

Coleman and Yancey, for the appellants.

U. M. and G. B. Rose, for the appellees.

COCKRILL, C. J. This is a suit by some of the distributees of the estate of John S. Dugger, against the sureties on the bond of the delinquent executor, to recover the sum of \$291.50 and interest, as the value of property of the estate converted by the executor. The validity of the bond and the delinquency of the executor are not questioned. The defendants, who are the appellees here, were released from future liability upon the bond by the probate court, and new sureties were supplied in lieu of them after the converted assets were received by the executor. It is argued that the breach of the bond occurred after their release, and that they are not liable. But the facts as certified to us fix the date of the conversion in the lifetime of the defendants' liability. The property was not accounted for, nor was the claim for it passed upon in the adjudication and allowance of any of the executor's accounts, in such a

manner as to preclude the probate court from eventually charging him with it, and requiring a distribution, as it did, of the full amount due to the distributees. The right of recovery is therefore plain. But there is an obstacle in the way of a full recovery. Three of the distributees, who are plaintiffs in this cause, became sureties on the bond at the time the defendants were released. They signed the old bond upon which the defendants were sureties, and the conditions of their undertaking were, of course, identical with those the defendants had assumed. The conversion had taken place when they signed, and the liability of the defendants, who were the former sureties, had become fixed. It required only the order of the probate court to authorize suit against them. But the breach was a continuing one, because it was still the executor's duty to account to the probate court for the proceeds of the property; and when he failed to comply with the order of the court directing him to pay over the amount with which he had been charged on that account, the new sureties became liable by the terms of their undertaking to make good his default. There are no terms in the office of executor or administrator, and the principle which is properly invoked in the case of a public officer who executes a bond for the faithful discharge of the duties of his office for the term upon which he is about to enter is not applicable. The new bond, or the obligation of the new sureties, relates back, and the two sets of sureties are jointly liable to the distributees and others for whose benefit they have contracted, for breaches committed prior to the second execution: *Schouler on Executors*, sec. 148; *Beard v. Roth*, 35 Fed. Rep. 397; *Scofield v. Churchill*, 72 N. Y. 565; *Choate v. Arrington*, 116 Mass. 552; *Dawes v. Edes*, 13 Id. 177; *Commonwealth v. Gould*, 118 Id. 300; *Pinkstaff v. State*, 59 Ill. 148; *State v. Berning*, 74 Mo. 87; *Morris v. Morris*, 9 Heisk. 814; *Powell v. Powell*, 48 Cal. 234; *Field v. Pelot*, 1 McMull. Eq. 369.

But where there are two or more sureties for the same principal debtor, and for the same obligation, whether on the same or on different instruments, they are co-sureties, and as between themselves are under the obligation to equalize their common burden: *Schouler on Executors*, *supra*; 3 *Pomeroy's Eq. Jur.*, sec. 1418; *Powell v. Powell*, *supra*; *State v. Berning*, *supra*. The case is readily distinguished from the class to which *Chrisman v. Jones*, 34 Ark. 73, belongs: See *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq., pt. 1, pp. 155 et seq. If

the defendants, then, are forced to pay the deficiency sued for, they will be entitled to contribution against the new sureties. But the new sureties are distributees, and are all plaintiffs in this suit. The defendants' answer, which sets forth all the facts, presents an equitable defense to the extent of the amount they could claim by way of contribution against their co-sureties, who are plaintiffs. For the excess over that sum, the plaintiff co-sureties are entitled to recover as distributees. Narcissa Davis, who is one of the distributees, and a plaintiff and appellant here, is not a surety on the bond, and is entitled to her full distributive share of the sum sued for.

The judgment will be reversed, and a judgment entered here in accordance with this opinion.

RIGHT OF ONE SURETY TO ENFORCE CONTRIBUTION FROM ANOTHER, and the remedies for its enforcement: Extended note to *Gross v. Davis*, 10 Am. St. Rep. 639-647; *Wolcott v. Hagerman*, 50 N. J. L. 289; *Tilcomb v. McAllister*, 81 Me. 399; *Block v. Estes*, 92 Mo. 318; *Mason v. Pierron*, 69 Wis. 585.

SHEPHERD v. JERNIGAN.

[51 ARKANSAS, 275.]

CONVEYANCE BY CO-TENANT. — If several pieces of land are held in common by the same persons, either may convey his interest in each parcel.

CONVEYANCE BY CO-TENANT OF A TOWN LOT. — If co-tenants of a single tract of land by agreement lay it off into town lots, each may thereafter convey his interest in any of such lands.

BETTERMENTS — RIGHT OF OCCUPYING CO-TENANTS TO VALUE OF IMPROVEMENTS. — One who improves land in good faith in the belief that he is the owner thereof in severalty is entitled to payment for such improvements by the terms of the betterment act; and his co-tenant will not be permitted to recover a moiety of such land, except upon condition of paying his share of the improvements, although the person making the improvements had constructive notice of the plaintiff's title.

Crumpp and Watkins, for the appellant.

The appellee in person.

COCKRILL, C. J. This is an action of ejectment. The plaintiff and defendant were each the grantee of different tenants in common of the town lot in controversy, though the title deed of each purported to convey the entire estate. The lot was a part of an eighty-acre tract which had been patented to one Evans, who sold an undivided interest in it to D. B. Jernigan. It was then laid off into town lots by Evans and D.

B. Jernigan, when the latter conveyed his interest in the lot in suit by deed, as mentioned above, to the plaintiff, J. M. Jernigan, who is the appellee here. The Eureka Improvement Company afterwards obtained a conveyance from D. B. Jernigan and the other grantees of Evans to the entire interest in the eighty acres. The defendant, Shepherd, is the grantee of the Eureka Improvement Company. The plaintiff's deed was recorded when D. B. Jernigan made the second transfer. The cause was submitted to the court without a jury. The defendant asked the court to declare the deed of D. B. Jernigan to the plaintiff of no effect, upon the ground that it was an attempt by one tenant to convey a part of a larger tract owned in common by him and others, but the court refused the request, and ruled that the common estate having been divided into lots by the consent of the owners, a conveyance by one tenant of any lot carried the title to his interest therein.

The evidence tended to show that the defendant had entered into possession and made valuable improvements upon the land, under the belief that he was the sole owner, but the court refused to allow him the benefit of the betterment act, upon the ground that the plaintiff's deed was of record when the defendant's grantor obtained its title. These two propositions present the questions raised by the appeal. The judgment was for the plaintiff for an undivided one fifth of the lot.

Whether one tenant in common can convey his share of a specific portion of a larger joint estate is a question upon which the authorities are not harmonious: See Freeman on Cotenancy, secs. 199 et seq.; 3 Washburn on Real Property, *565, sec. 25 a; 1 Id. *417; Tiedeman on Real Property, sec. 258.

But where several parcels of land are held in common by the same parties, the rule is that either may convey his interest in a separate parcel. This is true even in jurisdictions which deny the right of the tenant to make a valid conveyance to a several part of a larger joint estate. And where the subject of the tenancy is a single tract of land, the cotenants may, by agreement, convert it into several smaller tracts, as by laying it off into town lots, and so become cotenants of each lot; and each is thereafter capable of conveying his interest in any of the several parcels: Freeman on Cotenancy, sec. 208. The authorities are reviewed, the question ably presented, and the conclusion we have stated reached in the case of *Butler v. Roys*, 25 Mich. 54; 12 Am.

Rep. 218; see also *Primm v. Walker*, 38 Mo. 99; *Barnhart v. Campbell*, 50 Id. 597; *Markoe v. Wakeman*, 107 Ill. 262; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466.

The objection urged to the legality of the conveyance in this class of cases is, that it impairs the right of the other co-tenant in respect to partition; that instead of giving him his share in one parcel, as he might have if there had been no conveyance by his co-tenant, it may require him to take it in many distinct parcels. No question of partition arises in this cause; and whether partition would be directed in favor of the tenant whose interest remains intact without reference to his co-tenant's conveyances, or whether those conveyances are in contemplation of law no prejudice to the co-tenant, are questions not germane to our inquiry: See authorities *supra*; and *Stark v. Barrett*, 15 Cal. 361; *Gates v. Salmon*, 35 Id. 588; 95 Am. Dec. 139; *Sutter v. San Francisco*, 36 Id. 116; *Robinett v. Preston's Heirs*, 2 Rob. (Va.) 278.

If the plaintiff's grantor, who was co-tenant of the entire tract, had been excluded from the participation in the possession of the particular parcel in suit, he might have maintained his action of ejectment for that parcel alone. But as to the possession of that parcel, the plaintiff's attitude is as good as his grantor's, and it is no prejudice to the defendant to permit the grantee of his co-tenant to enjoy the fruits of a parcel of the undivided property.

If, however, the defendant has improved the land in good faith, under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of title, such as is implied from the registry of a deed, is not in itself sufficient to preclude an occupant from its benefits: *Beard v. Dansby*, 48 Ark. 186. The plaintiff must, therefore, pay one fifth of the value of the improvements before he can be let into possession of the undivided interest to that extent. The judgment refusing to allow the defendant for improvements is reversed, and the cause will be remanded for further proceedings in that regard. The judgment of recovery is affirmed, but shall not be executed until the further order of the Carroll circuit court.

CO-TENANCY. — A tenant in common may sell and convey his undivided interest: *Butler v. Roys*, 25 Mich. 53; 12 Am. Rep. 218; *Green v. Arnold*, 11 R. I. 364; 23 Am. Rep. 466; *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 230; *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133, and note; *Paye v.*

Branch, 97 N. C. 97; 2 Am. St. Rep. 281. But a tenant in common cannot sell the whole common property without the authority of his co-tenants: *Sims v. Dame*, 113 Ind. 127.

BETTERMENTS—IMPROVEMENTS IN GOOD FAITH.—The right of a purchaser to recover his improvements in an action by his vendor to rescind the contract of sale is not governed by the statutes with respect to actions of trespass to try title: *Eberling v. Verein*, 72 Tex. 339. A plea by the defendant in trespass to try title, claiming compensation for improvements made in good faith, alleging that the land was sold for taxes in 18—, and that the sale was made in 1878, under which defendant claimed, must be stricken out on special exception: *Gulf etc. R'y Co. v. Poindexter*, 70 Id. 98. A defendant who claims compensation for improvements made by him upon the real estate sued for must show that his possession was in good faith: *Brown v. Bedinger*, 72 Id. 247; *Holstein v. Adams*, 72 Id. 486; and he must not only believe that he has a superior title, but there must be reasonable grounds for such belief: *Johnson v. Schumacher*, 72 Id. 334. So an imperfect deed may be the valid basis for a claim for improvements, when made by a possessor in good faith, under such deed: *Coker v. Roberts*, 71 Id. 597; but one claiming improvements must have been in possession under at least a color of title: *McClellan v. Omodt*, 37 Minn. 157; *Barrett v. Strahl*, 73 Wis. 385; 9 Am. St. Rep. 795, and cases cited in note 805, 806. One in possession under a deed giving him a remainder in fee upon condition that he supports the life tenant does not hold the premises "under a supposed legal title" within the statute respecting betterments: *Walker v. Walker*, 64 N. H. 55; nor does the statute apply to a case where a co-tenant, being also a life-tenant of the entire premises, and keeping his co-tenant out of possession, is sued by the latter: *Curtis v. Fowler*, 66 Mich. 696; but the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title, and has made permanent and valuable improvements thereon, is accountable only for the fair rental value of the property as it was when he went into possession: *Carver v. Fennimore*, 116 Ind. 236. A person who claims under a deed which gives him the means of knowing the limits of the land conveyed by it is not a possessor in good faith when asking for improvements made by him on realty without the limits of his deed: *Smith v. Navasota City*, 72 Tex. 422. One may be entitled to permanent and necessary improvements upon realty when under a similar state of affairs he would not be entitled to compensation for temporary and movable improvements: *Hale v. Young*, 24 Neb. 465. It may be permissible for the court to ascertain and allow compensation for improvements, even though no claim is made for improvements by the one entitled thereto: *Moore v. Ligon*, 30 W. Va. 147. Compare *Holstein v. Adams*, 72 Tex. 486; *Ogden v. Ball*, 40 Minn. 94.

Where compensation for improvements made in good faith are asked for, defendant may prove that he never heard of the plaintiff, that plaintiff had not paid the taxes upon the land, and that defendant had paid them: *Polk v. Claiborn*, 72 Tex. 501. In ascertaining the enhancement of the value of land by reason of certain improvements, testimony of witnesses as to the mere value of the improvements, without reference to the enhanced value accruing to the land thereby, should be disregarded: *Fisher v. Edington*, 85 Tenn. 23. As to the burden of proof in a case where a plaintiff in ejectment replies to defendant's answer, and in his reply sets up a claim for improvements under the occupying claimant's act, see *Mueller v. Jackson*, 39 Minn. 431.

There must have been a judgment for the plaintiff in an ejectment suit before the proceedings can be instituted by the defendant under the "act for

the relief of the occupying claimant": *Asia v. Hiser*, 22 Fla. 378; but in Wisconsin it has been held that where claim for improvements is made by a defendant in ejectment, whether set up as a counterclaim or made after verdict and before judgment, he is entitled to have the issue tried by a jury before judgment: *Fowler v. Schafer*, 69 Wis. 23.

GOODBAR v. LINDSLEY.

[51 ARKANSAS, 380.]

DAMAGES. — IF AN ATTACHMENT IS MALICIOUSLY SUED OUT, the defendant cannot recover damages therefor, unless he has suffered some injury therefrom.

THE DAMAGES WHICH MAY BE RECOVERED FOR A MALICIOUS ATTACHMENT must be restricted to injury done by the writ, without regard to what it may have, by its example, induced another creditor to do. Hence the defendant cannot recover for a malicious attachment because it occasions some of his judgment creditors to issue executions on their judgments, and to seize and sell his property thereunder, as they have the right to do.

LEVY OF ATTACHMENT ON THE DEFENDANT'S BOOKS OF ACCOUNT IS A LEVY ONLY ON THE MATERIALS of which they are composed, and not upon the credits or accounts therein set forth.

DAMAGES RECOVERABLE FOR MALICIOUS ATTACHMENT DO NOT INCLUDE EXPENSES incurred by the defendant in prosecuting an action to recover such damages.

U. M. and G. B. Rose, and O. P. Lyles, for the appellants.

E. F. Adams and H. M. McVeigh, for the appellee.

COCKRILL, C. J. Goodbar & Co. sued out an attachment against Lindsley in an action at law, but failing to sustain their cause in that behalf, damages were assessed in the same proceeding, as authorized by the statute, against them and their sureties in the attachment bond for the wrongful issue of the attachment. The question presented by the appeal is, Does the evidence sustain the assessment of damages?

The attachment went into the hands of the sheriff simultaneously with two executions which had been issued upon judgments recovered by other creditors against the attachment defendant. The three writs were levied together upon a stock of merchandise and some live-stock, the defendant's books of account, and some ungathered cotton in the field. The merchandise and live-stock were sold under the execution, but failed to bring enough to pay them off. The defendant in the attachment testified in a general way that they were sold under the attachment, but that was merely a matter of opinion on his part, and was obviously an incorrect statement; for the

sheriff who held the order of attachment was not authorized by it to do more than perfect a levy upon the property, and the record shows that the order was returned and filed in the clerk's office by the sheriff before the sale; and it fails to show any further action under it by the officer, who specifically testified that the sale was made under the executions only.

1. It is argued that the attachment was maliciously sued out, and that the defendant may recover on that score. But the recovery in proceedings of this nature is confined strictly to compensatory damages, and cannot go beyond: *Holliday v. Cohen*, 34 Ark. 710 et seq.; *Patton v. Garrett*, 37 Id. 612, 613; *Boatwright v. Stewart*, 37 Id. 619-621.

2. But it is urged that the proof shows that the issue of the attachment precipitated the levy of the executions; that those writs would not have issued at all if the plaintiff's wrongful process had not been sued out; that it was the cause of the injury, and that the verdict is, therefore, justified. But the recovery against the Goodbars and their sureties must be based on the injury that was done by their writ, without regard to what another creditor may have been induced by their example to do. If another person, acting without privity or concert with them, has been guilty of an injurious act, he, and not they, is responsible therefor; for the two are independent actors. The rule that consecutive wrongs done by independent agents cannot be joined together to increase the responsibility of one of the wrong-doers has been applied, with apparent correctness, in a case where the issuing of one wrongful attachment was the occasion of the issuing of others: *Marqueze v. Southeimer*, 59 Miss. 430. But the executions in this case were not wrongfully issued. It was lawful for Lindsley's creditors to issue process upon their judgments, and to cause his property to be seized and sold for their satisfaction; and the levies and sales did not become unlawful because they were precipitated by the bad example of the appellants. It is not an actionable wrong to induce a man to assert his legal rights: Bishop's Non-Contract Law, sec. 489.

The only injury proved to the merchandise and live-stock was the loss by reason of the sale, which, we have seen, was made by virtue of the executions alone; but there is no liability upon the bond of the attaching creditors for that injury. As there was no proof of actual injury to the live-stock or merchandise by the wrongful attachment, only nominal damages could be assessed on that account.

3. The defendant laid his damages at five hundred dollars because of the levy upon his books of account. These books showed who his debtors were; and the levy upon them seems to have been regarded by the parties as a levy upon the debts, which, it is said, were lost by reason of the levy. But a levy upon a debtor's credits can only be reached by garnishment or judicial proceedings. A levy upon his books is a levy only upon the materials which compose them, or the property represented by the books themselves, nothing more (2 Freeman on Executions, sec. 262), and does not prevent the person to whom the debts are due from pursuing any of his remedies for collection against his debtor. It was only by the supposed suspension or deprivation of the right to collect the debts that any damages were claimed on that behalf. It was said that the debts were secured by mortgages on cotton by insolvent debtors, who shipped the cotton while the sheriff held the books. But that fact showed no legal injury traceable to the attachment.

4. The defendant's personal expenses incurred in attending the trial of the case were laid at seventy-five dollars. It was not shown that any part of that amount was expended in resisting the wrongful attachment. But it is on account of the attachment alone that a recovery can be had on the attachment bond. Expenses incurred by a defendant in attachment in prosecuting his own suit for damages must be borne by himself, the same as expenses are borne by others who become actors in the courts to right their wrongs.

5. The items enumerated embrace the only elements of damages claimed upon the trial, except an inconsiderable loss to cotton in the field. No argument has been made in reference to it by either side, and we leave it, as counsel has done, without comment.

The verdict was for \$1,485, which the court reduced to \$750. But that amount is grossly in excess of the damages shown by the proof to be legally assessable in the proceeding, and there must be a new trial.

Reverse the judgment, and remand the cause.

MALICIOUS ATTACHMENT — DAMAGES. — Only actual damages can be recovered where an attachment is simply wrongfully sued out; but where it is maliciously sued out, with intention to harass and injure the defendant, exemplary damages may be awarded: *Reed v. Samuels*, 22 Tex. 114; 73 Am. Dec. 253; compare *Wood v. Barker*, 37 Ala. 60; 76 Am. Dec. 346; extended note to *Burton v. Knapp*, 81 Am. Dec. 467-480; *Mayer v. Duke*, 72 Tex. 445.

BELL v. PELT.

[51 ARKANSAS, 432.]

VENDOR'S LIEN DOES NOT EXIST WHEN the vendee, in consideration of the conveyance of land to him, gives his contract to deliver the vendor specified quantities of personal property.

EQUITABLE MORTGAGE. — ANY AGREEMENT WHICH SHOWS AN INTENTION TO CREATE A LIEN is an equitable mortgage. Therefore a promissory note, followed by the statement that the note is given "as aid for that of the purchase-money" of a certain parcel of land, a description of such land, and the further statement that a "vendor's lien is hereby reserved on such land for the purchase money," constitutes an equitable mortgage, though not given to the vendor of the land described.

J. M. Kelso, for the appellant.

Atkinson and Tompkins, for the appellee.

HEMINGWAY, J. The record in this cause discloses about the following state of case: On the first day of November, 1879, one W. W. Atkinson sold to the appellant, by warranty deed, for the consideration of nine hundred dollars, the lands in controversy. The deed recites full payment of the consideration in cash, but a part, at least, was not so paid. The appellant gave Atkinson two or more obligations for the delivery of cotton, and it is probable that the entire consideration was to be so paid. Two of these cotton obligations were assigned by Atkinson to the appellee; the cotton was not delivered according to their terms, and on the 10th of January, 1883, the appellant and appellee had a settlement of the matter, and fixed the sum of \$320.64 to be paid on account of them. When the settlement was made, the appellant executed and delivered to the appellee an instrument in the words following:—

"\$320.64. On or by the first day of November, 1883, I promise to pay James D. Pelt, or bearer, the sum of three hundred and twenty dollars and sixty-four c'ts, for value received, with ten per cent interest from the first day of November, 1882. This note given as aid for that of the purchase-money of parcel land, the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sec. 21, and the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, sec. 17, and the N. E. $\frac{1}{4}$ of sec. 20, all in township 15, range 20 west, and vendor's lien is hereby reserved on said land for the purchase-money, all of the above land being in the county of Columbia and state of Arkansas.

"This the 10th day of January, 1883.

"Witness my hand.

"Witness, J. D. PELT."

"JOHN M. ^{Ms} × BELL.
mark

In the deed from Atkinson there was no express reservation of a lien. The complaint alleges the execution of the deed, the assignment of purchase-money notes, that a lien was reserved in the deed, that the settlement of January 10, 1883, was made, and asks that the lands be charged with a lien and sold to pay the debts.

The defendant filed a general demurrer with answer.

He contests the claim to a lien, — 1. Because the plaintiff sued as assignee, and no lien was expressly reserved in the deed; 2. Because obligations to deliver cotton, executed in purchase of land, are not secured by a vendor's lien.

The plaintiff demurred to the answer, his demurrer was overruled, and the suit went to final hearing. The court found that the instrument of January 10, 1883, was intended to be, and in fact was, a mortgage on the land, and accordingly rendered judgment, from which the defendant prosecutes this appeal. As the vendor's lien was not expressly reserved in the deed from Atkinson, Pelt, as the assignee of Bell's paper, could acquire none: Mansfield's Digest, sec. 474, and cases cited. As Bell gave no promissory notes in the purchase of the land, but gave contracts to deliver specified quantities of cotton at specified times, there was no vendor's lien even in favor of the vendor: *Harris v. Hanie*, 37 Ark. 348. The decree can find no support in the original transaction. This conclusion requires that we determine the character and effect of the instrument of January 10, 1883; for the decree must stand upon it, if at all. What is the instrument? It comprises, — 1. An ordinary promissory note by the appellant to the appellee; 2. A recital that it is given "in aid" of the note for purchase-money; 3. A stipulation that a lien is thereby reserved on the land, which is accurately described. This is not an ordinary technical mortgage; it contains neither words of grant nor defeasance. Is it an instrument which a court of equity will enforce as an equitable mortgage? Such an instrument has never received the consideration of this court, so far as we are advised.

In the case of *Barnett v. Mason*, 7 Ark. 254, a bill of sale was offered in evidence, and excluded, which contained the statement "that B. A. & L. are to retain a lien on the boat until the above-named notes are discharged." The court say that "the mere allegation in the bill of sale that they retained a lien cannot be considered a mortgage." Again, a note contained this expression: "The tax lien given by law on my

property, for which this money was advanced to pay taxes, I hereby recognize." But the law gave no lien, and as the owner only "recognized" the lien given by law, there was no lien fixed by the notes: *Peay v. Field*, 30 Ark. 600. A lien was claimed on a crop upon the following expression in a note: "This note constitutes a lien upon the cotton and corn raised upon said land this year." It was held not to create a lien; to be a mere assertion, and not an undertaking: *Roberts v. Jacks*, 31 Id. 597. A lease executed by both lessor and lessee, reserving a lien in favor of the lessor on crops to be grown on the demised land, was held to be a chattel mortgage: *Mitchell v. Badgett*, 33 Id. 387. A deed recited that "said lands and improvements are held bound for the payment of said two notes." This was held to be an equitable mortgage: *Talieferro's Ex'r v. Barnett*, 37 Id. 511. The recital in a promissory note given for land, that "this note is to stand as a lien on said land until fully paid," was held not to create a mortgage. No precise reason is given for this conclusion. The fact that the expression contains no words of grant is alluded to, but the opinion seems to rest on the reason that controlled in the other cases cited: that the terms used implied the mere suggestion of a fact, and not a stipulation; a statement, and not an obligation: *Waddell v. Carlock*, 41 Id. 523. The defect pointed out in the cases cited was, that, while the instrument under consideration contained statements in one form or another, that liens would be or were retained, they indicated no intent to create or fix the liens. They professed to state what were assumed as facts, but indicated no purpose to accomplish them. The instrument under consideration provides that "a vendor's lien is hereby reserved." It is not a recital of what has been done or exists, but is a manifest effort, by its own terms, and through its own efficiency, to produce the result. Mr. Pomeroy says that where an instrument manifests an intent to charge or pledge property, real or personal, as security for a debt, and the property is so described that the thing intended to be charged or pledged can be sufficiently identified, it is held that a lien follows: 3 Pomeroy's Eq. Jur., sec. 1237. An attempt to create a security in legal form having failed, equity will give effect to the intention of the parties, and enforce the lien as an equitable mortgage. Any agreement that shows an intention to create a lien is in equity a mortgage: 1 Jones on Mortgages, 168; *Daggett v. Rankin*, 31 Cal. 321. In the case of *Flagg v. Mann*, 2 Sum. 486, Judge

Story said, if a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage.

These principles have received a wide, if not universal, recognition and application. A purchaser of land executed two notes, with sureties, reciting that they were given for land, and providing, "in case I fail to pay said notes, I do bind myself, etc., to convey to said sureties the aforesaid land." Upon default in paying said notes, the sureties were held entitled to a mortgage on the lands: *Courtney v. Scott*, Litt. Sel. Cas. 457. So an instrument reciting that the maker had employed counsel to prosecute a claim for certain land, and would at the end of the litigation pay them a certain sum "out of the land," was held to be a mortgage: *Jackson v. Carswell*, 34 Ga. 279. An agreement by the owner to pay the occupant of his land a given sum, conditioned that if the land should be sold to raise the amount, the occupant would surrender his possession, meantime the use of the land to offset interest was held to be an equitable mortgage, and to charge a lien on the land: *Blackburn v. Tweedie*, 60 Mo. 505. A purchaser gave his obligation for the purchase of land. On the face of the bond, and immediately below the seal, it was stated that the land should be liable to the debt until the purchase-money was paid. It was held, in a suit by the assignee of the bond, that it was an equitable mortgage: *Eskridge v. McClure*, 2 Yerg. 84. The owners of land agreed in writing to pay a sum of money out of the proceeds of sale of land if they were sold; "it being understood and agreed that the debt was a charge on their joint estate in the land." This was held to charge the land with the payment of the debt: *Pinch v. Anthony*, 8 Allen, 536.

A vendor conveyed by absolute deed, but took the notes of his purchaser, in which a lien was reserved on the lands conveyed. Renewal notes were given, containing similar reservations. It was held, in a suit on them, that they constituted a lien on the lands which a court of equity would enforce: *Helm v. Weaver*, 69 Tex. 143. A deed contained a stipulation that if notes given in purchase of the land conveyed were not paid at maturity, it should be lawful for the sheriff to sell the lands conveyed to satisfy the notes. The notes were assigned, and the assignee brought suit to establish and foreclose a lien on the lands. As the vendor's lien had not passed to the assignee, the case turned upon the clause authorizing the sheriff to sell. It was contended that this provision constituted

neither a mortgage nor deed of trust; that there must be words of grant to constitute either. The court held that although it was not "an ordinary technical mortgage or deed of trust," it was intended to be a security for a debt, and was therefore an imperfect or equitable mortgage. This decision was placed upon the ground that courts of equity look through form to the substance of an agreement, and exact no peculiar formula to create a lien on lands: *Moore v. Lackey*, 53 Miss. 85. The case of *Mitchell v. Wade*, 39 Ark. 377, seems to sustain the doctrine of the cases last cited. Pillow was involved in a lawsuit with the executors of Pointer, affecting the title to lands. A compromise was agreed on, and in order to perfect it, Pillow borrowed money from Wade, a person not interested in the controversy, which was paid the executors. They conveyed to Pillow a tract of land comprising a part of the Defeat Cone place, by deed which contained the following stipulation: "The said G. J. Pillow stipulates and agrees that his portion of the Defeat Cone place shall be still held subject to a lien in favor of Wade." This was held to give Wade a perfect lien on the land. We are satisfied that Bell intended in the instrument of January 10, 1883, to fix a charge upon the land. It contravenes no rule of law or public policy, is supported by a valuable consideration, and accurately describes the land. There can be no doubt of its validity as a lien, unless it be necessary, in order to create one, to square the instrument by inflexible rules of technical conveyancing. The courts of equity make no such requirements. The findings and judgment of the circuit court were correct, and the judgment is affirmed.

EQUITABLE MORTGAGE, WHAT CONSTITUTES: *Hutzler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687, and particularly extended note 696-708; *Martin v. Nixon*, 92 Mo. 26.

VENDOR'S LIEN. — A vendor's lien for which notes have been executed is not modified or affected by the execution and substitution of other notes in lieu of the first notes: *Helm v. Weaver*, 69 Tex. 143. A lien for purchase-money exists between a vendor and purchaser, even though it is not apparent from the deed that some or all of the purchase-money remains unpaid: *Brown v. Ferrell*, 53 Ky. 417. A vendor's lien need not be expressed in a contract for the sale of land; for, in the absence of anything showing an intention to waive it, such a lien is always implied: *Robinson v. Appleton*, 124 Ill. 276; and when a purchaser denies the existence of a vendor's lien, the *onus probandi* is upon him to rebut the presumption of its existence: *Dutton v. Outhouse*, 64 Mich. 419. But no lien can be said to exist where no title has been conferred upon the supposed purchaser: *Harper v. Wilkins*, 65 Miss. 215.

VENDOR'S LIEN — WAIVER OR EXTINGUISHMENT OF. — Accepting personal security upon a note given to secure the purchase-money of land which has been sold is *prima facie* a waiver of the vendor's lien: *Ramage v. Towles*, 85 Ala. 588; but when a note, reciting that it is given for unpaid purchase-money, contains a waiver of exemptions of personalty, it is not presumptively a waiver also of the vendor's lien: *Thompson v. Sheppard*, 85 Id. 611; nor does a clause in a bond for a deed, providing for a forfeiture of the contract in case of default in any of the payments, operate as a waiver of the vendor's lien for unpaid purchase-money: *Robinson v. Appleton*, 124 Ill. 276; and a vendor's lien is not extinguished by the mere assignment of the purchase-price notes by the vendor as collateral security for his debts: *Cate v. Cate*, 87 Tenn. 41.

CITY OF FORT SMITH v. DODSON.

[51 ARKANSAS, 447.]

EVIDENCE. — THE ONUS PROBANDI is on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.

POUND-KEEPER MUST SHOW THAT HE HAS STRICTLY COMPLIED with the law in order to successfully defend an action brought against him by the owner of an impounded animal.

PRESUMPTION. — NOTICE OF THE IMPOUNDING AND SELLING of an animal will not be presumed where it was impounded and sold by a city marshal acting under an ordinance of a city, which required him within two days after impounding an animal to give specific notice of the same, and that the property would be sold at public auction five days from the date of such notice.

T. S. Osborne, for the appellant.

Clayton and Forrester, for the appellee.

HEMINGWAY, J. This is an action in favor of the appellee to recover of the appellant twenty-five dollars, the value of a hog. It was tried in the Sebastian circuit court upon an agreed state of facts, substantially as follows: The hog belonged to plaintiff; it was worth twenty-five dollars; it was sold by the defendant's marshal, who assumed to act by the authority of a city ordinance; the ordinance was in full force, prohibited the running at large of swine on the streets and uninclosed grounds of the city, and cast upon the marshal the duty to take up and impound swine found at large in violation of the ordinance.

The ordinance further provides that "within two days after impounding the animal the city marshal shall cause to be posted in three public places in the city limits a notice of the same, containing a description of the animal so impounded,

the date of impounding, and notice that the same shall be sold at public auction, to the highest bidder, five days from the date of said notice, unless said animal shall be reclaimed before that time." There was evidence tending, upon the one side, to prove that the prescribed notice had been given; and upon the other, that it had not been given. There was no other issue in the cause. The plaintiff asked, and the court gave, the following instructions: "That the burden of proof is upon the defendant city to show, by a preponderance of the testimony, that the city marshal complied with the ordinance read in evidence, by giving the notice therein required before making the sale." To this action of the court the defendant excepted, and asked the court to give instructions placing the burden of proof that notice was not given on the plaintiff. The court refused to give the instruction asked, and the defendant excepted.

There was verdict and judgment for the plaintiff, from which the defendant prosecutes this appeal. The only error complained of is the action of the court in giving the instruction asked by the plaintiff, and refusing the one asked by defendant. Did the law cast upon the plaintiff the burden of proving that the notice had not been given? Or was the burden cast on the defendant to prove that it had been given? A sale without the notice would be a nullity. In one case, where notice had been given for a time less than that required by only a part of a day, the sale was held void. In another, the law required ten days' notice, and but eight days' notice was given, and the sale was held void. Notice is required to apprise the owner that his animal is impounded, and will be sold unless reclaimed. In the ordinance under consideration, the notice is given by posting bills in three public places in the city; and if the animals posted are not reclaimed in five days, they are sold by the marshal, and title transferred. Notice is the fact that imparts validity to the marshal's act, and deprives the owner of title to his property. It is the warrant of the officer. It is affirmative, defensive matter; it is matter peculiarly within the knowledge of the city. In so large a city as Fort Smith, while the city could easily prove whatever notice it gave, it would be exceedingly difficult for the owner to prove that no notice had been given. Any number of persons might testify that they had not seen the notices; still the fact would not be proven that notices had not been posted. That is the best proof the owner could offer.

If the notice had been given, it was done through the agent of the city, who could be called and easily establish the fact.

A general rule of evidence requires "that the issue must be proved by the party who states an affirmative, not by the party who states a negative." Another, that "the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant": Bailey's *Onus Probandi*, 1.

If the action of the lower court should be tested by these rules, there would be little doubt that it was correct.

But it is contended that the sale was made by an officer, and that the law will presume that all things requisite to its validity were done. This contention is met by the opposing contention that the law raises no presumptions in favor of the sales of officers made under special statutory authority, without judgment or decree of court, and that they depend for their validity upon a strict compliance with the statutes authorizing them.

In the case of *Ross v. Ford*, 2 Ark. 26, a sheriff made return upon a summons in the following language: "Executed the within by reading, April 9, 1839." The rule under consideration was invoked to sustain the return. The court held the service bad, and declared that the rule raised for facts stated the presumption of truth, but could not be invoked to supply necessary facts that were omitted.

In the case of *Hogins v. Brashears*, 13 Ark. 242, the plaintiff offered in evidence a tax deed. Objection was raised to its introduction because its recitals failed to show a sale according to law. The court held that the deed should disclose the performance of all "essential prerequisites," and that nothing was presumed as to their performance. We think the correct application and extent of the rule is defined by the court in the case of *Davany v. Koon*, 45 Miss. 71. The matter under consideration was the lease of sixteenth-section lands, and what presumptions would be raised by the law as to the performance of conditions essential to its valid execution. The court say: "When the register, receiver, or state commissioner issues a paper, on its face conforming to the law, that a certain person has become the purchaser, it has always been held that the paper itself is *prima facie* evidence that all things required to be done have been performed. It is the state who can only act through agents and officers, disposing

of lands held by her for public purpose, and not like the case of a marshal or tax collector, who assumes the right to sell private property for a sum due to the government. Before the citizen can be deprived of property for public uses, or to satisfy a debt to the state, the due course of law must be rigidly pursued. An officer laying his hand upon the property of the citizen, and passing the title by sale, must be strictly within the pale of the law, and his purchaser must show full compliance."

The rule of presumption would be the same whether the city or its purchaser were defending. The law could not exact a more rigid compliance with the conditions of authority of a tax collector than of a pound-keeper. Each acts without any warrant from a court, upon a state of facts authorizing it, of the existence of which the pound-keeper certainly judges alone for himself. It is a rule of law, as well as of common justice, then, which exacts that the pound-keeper must show that he has strictly complied with the law, to justify an action brought against him by the owner of the animal: *Dillon on Municipal Corporations*, sec. 150. That the notice must be given, and that the burden of proving it is upon the pound-keeper or those who justify under him, whether the proof can be made easily or not, is announced by high authority: *Clark v. Lewis*, 35 Ill. 417; *Coffin v. Vincent*, 12 Cush. 98; *Morse v. Reed*, 28 Me. 481.

Mr. Chief Justice Marshall, discussing a claim under a tax deed, said: "If the validity of a deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record. . . . These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. . . . It is easy, for example, to show that the collector has posted up the necessary notifications in four public places in his election district, as is required, but very difficult to show that he has not." He then sustained an instruction of the circuit court to the effect that the burden rested upon the tax purchaser to show that the lands had been advertised for sale as the law directed, and that such proof could not be supplied by the legal presumption that the officer did his duty: *Williams v. Peyton's Lessee*, 4 Wheat. 77. The sale of property under this class of ordinances, like the sale for taxes, is in derogation of private property rights. It deprives an

owner, *in invitum*, of his property, and transfers it to another. Attempts to enforce these ordinances should not be received with more favor than attempts to sell for taxes. They affect the citizen in the same way, are executed alike without judicial warrant, and a rigid compliance with the conditions of authority should be exacted of officers, and proven by all persons who justify under them.

The judgment is correct, and will be affirmed.

BURDEN OF PROOF. — As to the general rules respecting the burden of proof: Note to *Oldham v. Kerchner*, 28 Am. Rep. 308, 309. The general rule is, that the burden of proof is upon him who asserts the affirmative of an issue: *Blum v. Strong*, 71 Tex. 321; *Chrisman v. Chrisman*, 16 Or. 127; *Knott Whitfield*, 99 N. C. 76; and the one asserting the affirmative of an issue is usually the plaintiff: *Scott v. Pettigrew*, 72 Tex. 322; and the burden of proof will not shift from the plaintiff to defendant, although the defendant alleges new matter in his answer, provided such affirmative allegation was unnecessary, and immaterial to the issues in the case: *Honire v. Rodgers*, 74 Iowa, 396; but the burden does shift from plaintiff to the defendant, ordinarily, when the defendant sets up and affirms new matters in his answer or defense: *Smith v. State*, 86 Ala. 28. But the general rule as to the burden of proof is subject to the following modification: that when a fact is peculiarly within the knowledge of one party, rather than of the other, the former has the burden cast upon him of proving such fact: *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162. But he upon whom the burden of proof is cast, in civil cases, need only establish his case by a fair preponderance of evidence: *Missouri P. R'y Co. v. Brazil*, 72 Tex. 233.

ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY v. GRAFTON.

[51 ARKANSAS, 504.]

REWARDS. — THE POLICY OF THE LAW FORBIDS A PUBLIC OFFICER, or those called to aid him in the discharge of a public duty, receiving for his or their services any reward or compensation beyond that allowed by law.

REWARDS. — PERSONS ACTING AS A POSSE COMITATUS AND AS SPECIAL DEPUTY SHERIFFS, and under the direction and immediate control of the sheriff of a county, and who, while acting in the discharge of their duty, arrest persons for whose arrest and conviction a reward has been offered, are not entitled to such reward, because in making such arrest they are simply doing their duty.

Dodge and Johnson, for the appellant.

Arnold and Cook, for the appellees.

HUGHES, J. In March, 1886, in the time of the great strike upon the Missouri Pacific railway system, the appellant

offered a reward of five hundred dollars each for the arrest and conviction of any one found interfering with the switches, side-tracks, or railroad property in the county of Miller, in this state. Appellees brought suit to recover six thousand dollars of appellant for the arrest and conviction of twelve persons, alleged to have interfered with a switch on appellant's road. Appellant filed a demurrer to the complaint, and a motion for a change of venue, and the cause was transferred to Nevada County for trial. Appellant answered, admitting the offer of the reward, denying the arrest of the twelve persons named in the complaint, or any or either of them, or that any or either of the appellees prosecuted said twelve persons, or either or any of them, to conviction for interfering with defendant's (appellant's) switches, side-tracks, trains, or railroad property in the county of Miller; and denied that the twelve persons, or any or either of them, were ever arrested and convicted by the plaintiffs of the offense of interfering with defendant's property, as charged in the complaint.

The second paragraph in the answer avers that the twelve men were arrested by the sheriff of Miller County; that at the time of said arrests, said plaintiffs were each acting as a *posse comitatus* and as special deputy sheriff, and as a member of the Arkansas state militia, and under the direction and immediate control of the sheriff of Miller County, and were simply discharging their duty, and were not entitled to any reward. The case having been submitted to a jury, upon the testimony and instructions of the court, they returned a verdict for the plaintiff for six thousand dollars. Defendant filed a motion for a new trial, which was overruled, and he appealed to this court.

Without going into the evidence in detail, or discussing the instructions of the court below, we think that the evidence in the case shows that the appellees were, at the time of the arrest of the men for the arrest and conviction of whom they claim the rewards offered by appellant, acting as a part of the *posse comitatus* of the sheriff of Miller County, called out to aid him in preserving the peace, and in preventing interference with the railroad tracks, engines, trains, etc., in Miller County, and that they cannot be heard to say that in making the arrests they ignored the sheriff and acted as private individuals. We are of the opinion that the verdict is without evidence to support it. The policy of the law forbids a public officer, or those called to aid him in the discharge of a

public duty, receiving any reward or compensation for his services outside of that allowed by law. The plaintiffs were assisting the sheriff's deputies — and in fact some of the plaintiffs were his regular deputies — in making these arrests, and they were paid for their services as a sheriff's posse by Miller County. Public policy and the laws forbid that they receive other reward for the same. "The rewards of officers are established by law; their services are to be performed for these legal rewards; and other private rewards for acts which are required from them as public duties by the laws of their country and the obligations of their stations must be regarded as corrupt and illegal exactions": *Weaver v. Whitney*, 1 Hopk. 11. A promise of a reward for performing a duty is illegal and without consideration: *Pool v. City of Boston*, 5 Cush. 220; *Stotesbury v. Smith*, 2 Burr. 924. "It is against public policy to allow a man to receive a reward for doing his duty as a public officer": *Davies v. Burns*, 87 Mass. 352; *Kick v. Merry*, 23 Mo. 74; 66 Am. Dec. 658; *Means v. Hendershott*, 24 Iowa, 79; *Pillie v. City of New Orleans*, 19 La. Ann. 275.

"It is undoubtedly a sound rule of law that a public officer shall not be allowed to receive for performing an official duty any other compensation or reward than that which is permitted by law. . . . The statute makes it the duty of a sheriff to keep and preserve the peace of his county, for which purpose he is empowered to call to his aid such person or persons of his county as he deems necessary. He shall also pursue and apprehend felons, execute all warrants, writs, and other processes. And whether a sheriff arrests a party under a warrant or not, he acts in his official capacity; . . . for making an arrest in such case the sheriff is entitled to the same compensation as for making an arrest under a warrant. And the conclusion is, if the arrest is made by the sheriff or his deputies, he or they were but doing their duty, and are not entitled to a reward": *Warner v. Grace*, 14 Minn. 489; *Austin v. Supervisors of Milwaukee*, 24 Wis. 279; *Preston v. Bacon*, 4 Conn. 479; *Smith v. Smith*, 1 Bail. 71; *Smith v. Whildin*, 10 Pa. St. 40; 49 Am. Dec. 572; *Ring v. Devlin*, 68 Wis. 384.

The judgment is reversed, and the cause is remanded for further proceedings.

REWARDS. — A constable may claim a reward for making an arrest not required by his official duty: *Kasling v. Morris*, 71 Tex. 584; 10 Am. St. Rep. 797, and note 800. But one who gives such information to a sheriff as en-

ables him to capture an escaped prisoner, although he accompanies the sheriff as one of his posse, does not thereby become entitled to a reward offered for the capture of such escaped prisoner: *County of Juniata v. McDonald*, 122 Pa. St. 115. A contract arises upon compliance by a person with the conditions of an offer of reward for the arrest of a criminal: *McLeod v. Meade*, 77 Cal. 87.

FORDYCE v. McCANTS.

[51 ARKANSAS, 509.]

RES GESTÆ. — In an action against a railway company for the killing of the decedent, a physician was permitted to testify to the contents of a telegram received by him from the plaintiff (who subsequently sued as administrator of the decedent), that the witness drove some twelve or thirteen miles to see the deceased, and to what the deceased then told him regarding the injuries which he had received, and the means by which they had been occasioned. It was held that the admission of this testimony was error, that the contents of the telegram were hearsay, and the statements made to the physician were not part of the *res gestæ*.

DAMAGES TO A FATHER FOR THE DEATH OF HIS SON. — An instruction to a jury, in an action by a father to recover for the death of his son, that the measure of damages is the probable earnings of the deceased during his expectancy of life, less his expenses, taking into consideration his age, business capacity, habits, health, and energy, is erroneous, because the expectancy of the life of the son was much greater than that of the father, and the jury, in following the instructions, must give the father damages for a period of time after the probable termination of his life.

DAMAGES CAN BE RECOVERED BY A FATHER FOR THE DEATH OF HIS SON ONLY by showing that deceased gave assistance to his father, as by contributing money to his support, or that the father had a reasonable expectation of pecuniary benefit from the continued life of the son. In the absence of such proof, only nominal damages can be recovered.

J. C. Hawthorne, for the appellant.

Palmer and Nichols, for the appellee.

SANDELS, J. The appellee, as administrator of the estate of R. Lee Connor, deceased, sued appellant, Fordyce, as receiver of the Texas and St. Louis Railway Company, to recover damages for the killing of his decedent. It was alleged that deceased was a passenger upon said railway, and that by reason of the negligence, etc., of defendant's servants, the car in which deceased sat was thrown from the track, whereby deceased was killed. Defendant denied that deceased was killed by reason of said car being thrown from the track. It is alleged that the deceased left him surviving his father, L. D. Connor, his sole heir at law, who had suffered pecuniary loss and damage from the death of his son. While there is a

singular absence of proof identifying the time, place, and circumstance of the accident, it does appear that plaintiff, on September 25, 1885, found deceased lying about sixty yards from where there had been a wreck on a railroad, suffering much; that he caused him to be carried to his (plaintiff's) house, and sent for a physician; that the doctor, after driving some twelve or thirteen miles, arrived at McCants's house, and saw deceased about seven o'clock, P. M. Deceased complained of pain in the stomach, and was vomiting blood. He died seven or eight hours after the doctor arrived. The court permitted the physician, Youmans, against the objection of the defendant, to testify to the contents of the telegram received by him from McCants; that Connor had been injured; that there had been an accident on the railroad, and that he had been seriously hurt, and required the witness's assistance; and further, to the statements made to him (Youmans) by Connor, after his arrival at McCants's house; that he (Connor) had been thrown heavily across the corner of a seat, and so received the injury. Deceased was an adult, twenty-two years of age, and unmarried. The action was for the benefit of his father. There was verdict and judgment against defendant for six thousand dollars, and he appealed.

The appellant, among other causes for new trial, assigns as error the admission of the testimony of witness Youmans as to the contents of the telegram and the statements of the deceased to him as to the cause and manner of the injury, and also the giving of instructions prayed by plaintiff, and that prepared by the court.

1. The contents of the telegram were hearsay, and the statements of Connor to the witness were not part of the *res gestæ*. It was error to admit them. It does not follow in all cases that a reversal should ensue because improper testimony has gone to the jury. In this case, however, there is not, beyond the statements of Connor to Dr. Youmans, a *scintilla* of direct proof, and very little circumstantial, from which to conclude that deceased received his injuries by reason of the car being thrown from the track. And while, in the absence of this testimony, this court might sustain a verdict upon the other facts proved, it cannot measure the cogency of this statement with the jury, and think the admission of Connor's statement manifestly prejudicial to the defendant.

2. Lord Campbell's act, 9 & 10 Vict., c. 93, has been substantially re-enacted in many of the American states; and to

obviate the difficulties which early beset the construction of that act, as to the character of the loss for which a recovery might be had, and as to the principle upon which an action was maintainable, many legislatures provide that the damages shall be compensation, with reference to the pecuniary injuries resulting to the wife or next of kin of such deceased from the death. It is so provided in this state: Mansfield's Digest, secs. 5223, 5226. The liability of carriers, particularly under similar statutes, has been so stubbornly contested in the various states that every imaginable phase of the law has been somewhere and at some time presented. And upon a thorough examination of the authorities, it is a matter of no little concern that we find the opinions of the courts as divergent and unsatisfactory as the verdicts of the juries upon which they passed. The chief difficulty seems to lie in their failure to recognize the impossibility of laying down a fixed rule by which damages are to be measured in all cases.

Some courts say that the earnings of the deceased during his or her expectancy of life, less necessary expenses, should be the measure of damages. Others say that sums proportioned to those habitually given, the value of assistance habitually rendered, or amounts promised, which reasonably may be expected to be paid, should be the measure. While others, despairing, apparently, of a satisfactory formulation of a rule, say to the jury: "It would, perhaps, be a fair way, to estimate the amount of damages, to take the probable amount of his (deceased's) accumulation for the time he might reasonably have been expected to live, and find that for the plaintiff; but if you can find a better rule, you are at liberty to adopt it": *Pa. R. R. Co. v. McCloskey*, 23 Pa. St. 526.

There may be great differences between the pecuniary loss sustained by different persons who are next of kin. The pecuniary loss to a child of tender years arising from the death of its father is different from its pecuniary loss upon the death of the mother. In the latter case the care, moral, intellectual, and physical culture, bestowed by a mother have been held to have a pecuniary value: *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 287.

The loss of a husband produces still a different pecuniary injury to the wife; while the loss of an adult son to a father, as in this case, involves other elements of damage. By the fourth instruction given to the jury in this case they were told that the measure of damages was the probable earnings of de-

ceased during his expectancy of life, less his expenses, taking into consideration his age, business capacity, habits, health, and energy. How do we arrive at expectancy of life of deceased? Properly by tables compiled from mortuary reports. The expectancy of life of deceased was shown to be forty-two years. By the same table the expectancy of life of his father, for whose benefit this suit is prosecuted, is fourteen years. The vice of the instruction becomes apparent when we reflect that there is recovered by the father, as a pecuniary loss to himself, the accumulations of the son for a period of twenty-eight years, after he (the father) is presumed to have died. In this case the plaintiff can recover substantial damages for the father of deceased only by showing that deceased gave assistance to his father, — contributed money to his support, — or that the father had a reasonable expectation of pecuniary benefit from the continued life of the son; the reasonable character of this expectation to appear from the facts in proof. These should furnish the measure of damages. In the absence of such proof, only nominal damages can be recovered: *Pierce on Railroads*, 393-399, and cases cited; 3 Hurl. & N. 211; *Dalton v. South Eastern R'y Co.*, 4 Com. B., N. S., 296; 4 Jur., N. S., 711; *Pa. R. R. Co. v. Brooks*, 57 Pa. St. 339; 98 Am. Dec. 229; *Little Rock and Fort Smith R'y v. Townsend*, 41 Ark. 382; and many other cases. For the errors indicated, let the judgment be reversed, and the cause remanded for further proceedings.

RES GESTÆ. — As to what declarations are and what are not *res gestæ*: *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and cases cited in note 900; *City of Austin v. Ritz*, 72 Tex. 392.

HEARSAY TESTIMONY. — Hearsay testimony, as a general rule, is not admissible: *Wormadorf v. Detroit City R'y Co.*, 75 Mich. 402; 13 Am. St. Rep. 453, and cases cited in note 457; *Griffin v. Bristle*, 39 Minn. 456; but when the bodily or mental feelings or condition of a person are material, the usual expression of such feelings are admissible in evidence, although such evidence may be hearsay: *State v. Hargrave*, 97 N. C. 457.

PARENT AND CHILD. — Under a statute allowing an action to the parent of a minor child for injury to such child from negligence or wrong of another, pecuniary loss as to the child's services will be presumed: *Durkee v. Central P. R'y Co.*, 56 Cal. 388; 38 Am. Rep. 59; compare *Ihl v. Forty-second Street etc. R. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450. As to the measure of damages for causing the death of a child: Note to *Donaldson v. Mississippi etc. R. R. Co.*, 87 Am. Dec. 399 et seq.

MEASURE OF DAMAGES FOR PERSONAL INJURIES: See note to *Richmond etc. R'y Co. v. Normant*, 10 Am. St. Rep. 834, and cases therein cited. In an action for damages for personal injuries caused by another's negligence, the jury may consider the occupation of the plaintiff in estimating what amount of damages will fully compensate him for the injuries he has sustained: *Ohio etc. R. R. Co. v. Hecht*, 115 Ind. 443.

VAHLBERG v. KEATON.

[51 ARKANSAS, 594.]

USURY. — STATUTE OF ARKANSAS DENOUNCES the taking of usury, and upon all contracts for its payment impresses the stamp of absolute nullity; and this blight covers the entire transaction. It extends to the principal as well as to the unlawful interest contracted for.

USURY CANNOT BE IMPUTED TO THE RESERVING AND RECEIVING IN ADVANCE the highest lawful rate of interest.

USURY — DISCOUNT. — The interest for ordinary paper having the usual time to run, such as is the custom of banks, may be taken in advance by way of discount, and not subject the paper to the taint of usury.

CONSTITUTIONAL LAW. — The provision of the constitution of Arkansas denouncing the taking of usury must be understood as prohibiting that which had been judicially determined to be usury under pre-existing statutes of the state, or under the act of 12 Anne, upon the same subject, and a statute, therefore, does not violate this constitution because it permits interest to be taken in advance.

USURY. — WHAT A BORROWER PAYS TO HIS OWN AGENT for procuring a loan is no part of the sum paid for the loan or for the forbearance of money, and therefore cannot be regarded as impressing the transaction with the taint of usury.

USURY — BONUS PAID TO LENDER'S AGENT. — If the agent of the lender receive from the borrower a bonus in excess of the highest lawful rate of interest, either with the lender's knowledge or under circumstances from which the law presumes he had knowledge, then the transaction is usurious; while if the agent receives the bonus without the lender's knowledge, and under circumstances from which knowledge cannot be reasonably presumed, the transaction is not usurious. If a lender places money with an agent to be loaned, with the understanding that he must receive the highest lawful interest, and must look to the borrower for his commission, the circumstances necessarily import knowledge of the lender of a usurious bonus received by the agent; and if the money was so placed, and nothing said as to the compensation of the agent, the same result must follow, unless the relations between the lender and his agent are such as to reasonably justify the belief that the agent would act solely for the accommodation of the lender, and without expectation of reward.

R. G. Davies, for the appellant.

J. M. Harrell, for the appellee.

HEMINGWAY, J. The appellant, claiming title under the appellee, brought ejectment in the Garland circuit court to recover of her two parcels of land. The lands had been sold under the power contained in two deeds of trust executed by her, and the appellant had purchased them. She seeks to defeat the title thus acquired upon a plea that the deeds of trust were each given to secure usurious loans from the appellant to her.

The case was tried by a jury. There was verdict and judgment for the appellee, defendant in the court below. The appellee assigns, as grounds to reverse the judgment, that the court erred in instructing the jury. It is contended, on the other hand, that such error, if committed, was without prejudice to the appellant, for the reason that upon the evidence no other verdict than the one found by the jury could have been rendered. The evidence conclusively establishes the following facts:—

The appellee applied to one O. F. Smith, a broker in Hot Springs, for a loan of \$300; Smith procured that amount from the appellant, and delivered to him one of the notes and deeds of trust to which the taint of usury is now imputed; the note was for \$300, due in three months, without interest until due; Smith paid to the appellee \$261 of the amount procured from appellant, and returned to the appellant the amount of the interest on the note for three months at ten per cent per annum. Smith retained the amount of his own commissions, and the cost of acknowledging and recording the deed of trust. Whether this exhausted the balance or not is left in doubt. Afterwards, the appellee applied to Smith for a loan of \$100; Smith procured from appellant \$120, and delivered to him the appellee's note for that amount, due in three months, without interest until due, with a deed of trust on part of the land in controversy, to which note and deed of trust the defendant imputes the taint of usury; Smith gave to appellee \$100 of the amount thus procured, returned to the appellant the amount of the interest on the note for three months at ten per cent per annum, and retained out of the balance the amount of his own commissions, with fees for acknowledging and recording the deed of trust. Whether this exhausted the balance or not is left in doubt.

The appellant contends that upon each loan he received interest in advance at the rate of only ten per cent per annum, while the appellee contends that he received more.

The notes were not satisfied. The lands were sold under the power in the two deeds of trust, and the appellant purchased them.

Usury is charged,—1. Because the lender reserved interest in advance upon the face of the note at the highest lawful rate of interest; and 2. Because, in addition to the highest

lawful interest, paid directly to the lender, interest in excess thereof was paid, by way of bonus, to Smith.

As the notes were given for the entire amount applied for, and as the amount actually received by the borrower was less than such amount by the amount deducted for interest, it is contended that this constitutes usury to a mathematical certainty.

The constitution denounces the taking of usury, and upon all contracts for its payment impresses the stamp of absolute nullity. This blight covers the entire transaction; it extends to the principal as well as to the unlawful interest contracted for. Besides this, the constitution requires the general assembly to prohibit usury by law: Constitution 1874, art. 19, sec. 13. The general assembly which convened within a few weeks after the constitution was adopted, in the attempt to execute the mandate above, enacted a statute against usury. In it, it is provided, among other things, that all persons loaning money in the state shall be authorized to reserve or discount interest upon any note, bond, bill, draft, acceptance, or other commercial paper, mortgages or other securities, at any rate stipulated or agreed upon by the parties, not to exceed ten per cent: Acts 1874-75, p. 145; Mansfield's Digest, sec. 4736.

Unless the legislative interpretation of the terms of its mandate was in violation thereof, it is clear that usury cannot be imputed to the reserving in advance of the highest lawful rate of interest. Although the statute was intended to enforce, if it in fact violates, the provisions of the constitution, it is void. The language of the constitution, as of other similar instruments, is general and comprehensive. It deals with large topics couched in broad phrase; it attempts neither minute definition or enumeration. It should be so construed as to subserve its broad purposes, and in the accomplishment of this end, it should not be subjected to the application of arbitrary rules of construction, which, it is said, are more often resorted to as aids in ingenious attempts to make the constitution say what it does not than with a view to make it express its real intent: Endlich on Interpretation of Statutes, sec. 506; Cooley's Constitutional Limitations, 101.

As a constitution does not deal in detail or enumeration, we should not give it so broad a meaning as will carry it beyond its true sense and spirit, nor apply to it such narrow or constrained views as to defeat the object of those who framed it:

Cooley's Constitutional Limitations; *People v. Fancher*, 50 N. Y. 291; *People v. Cowles*, 13 Id. 350; *Temple v. Mead*, 4 Vt. 535.

It has been said by a court distinguished for its learning and ability that conventions do not always use language with mathematical accuracy, and that in them exceptions and qualifications are sometimes implied when not expressed: *Kennedy v. Gies*, 25 Mich. 83.

It is also said to be a correct rule in constitutional interpretation to construe it, not according to its technical meaning, but according to the acceptance of those who adopted it: *State v. Mace*, 5 Md. 337-351.

Mathematical scope and technical signification should each yield to the purposes of the instrument, to be ascertained upon an examination of its provisions, and a consideration of the evils it was intended to remedy, and the benefits it was intended to secure. The meaning may be drawn from all these sources, and should be in consonance with each of them. It must be presumed that it was framed and adopted in the light and understanding of prior and existing laws, and with reference to them. When the framers of a constitution employ terms which, in legislative and judicial interpretation, have received a definite meaning and application, which may be either more restricted or more general than when employed in other relations, it is a safe rule to give to them that signification sanctioned by the legislative and judicial use: *Daily v. Swope*, 47 Miss. 367-383.

Nor will it be presumed that the constitution intended to destroy or change the existing laws, except as such intent is manifested by its spirit and letter: Endlich on Interpretation of Statutes, sec. 520.

Applying these rules to the construction of the clauses under consideration, it becomes material to ascertain whether its terms had received judicial interpretation before it was incorporated into the constitution.

The statute of 12 Anne provided in substance that no person should take, directly or indirectly, for loan of money, etc., interest at a higher rate than five per cent per annum; and that all contracts whereby there was reserved or agreed to be paid interest at a higher rate should be utterly void. The question came before the court of common pleas under this statute, and Sir William Blackstone "conceived that interest may as lawfully be received beforehand, for forbearing, as after

the term is expired, for having forborn": *Lloyd v. Williams*, 2 W. Black. 792.

The same principle was approved under the same statute in so far as it applied to commercial transactions in bills and notes: *Auriol v. Thomas*, 2 Term Rep. 52; *Marsh v. Martindale*, 3 Bos. & P. 154; *Floger v. Edwards*, 1 Cowp. 112.

In the case last above, the court say: "Upon a nice calculation it will be found that the practice of the banks in discounting bills exceeds the rate of five per cent; for they take interest upon the whole sum, but pay only part of the money, viz., by deducting the interest first; yet this is not usury." Although this practice was held lawful under the usury laws, it was not permitted to become a cover for usury. In the case of *Marsh v. Martindale*, *supra*, the court, after approving this construction of the law to the extent indicated, says: "No shift will enable a man to take more than legal interest upon a loan."

If any English court ever gave to the statute of 12 Anne any other construction, it has not come within our knowledge. Its construction is of the highest importance in construing all subsequent legislation upon the subject, because it has been taken as the model for such subsequent legislation. Usury laws differ widely as to the effects of usury, but there are slight differences in defining its elements. As the American states have adopted the English statute as a model, so the American courts have adopted the construction given it by English courts. So we find the statement that "the courts uniformly hold, at the present day, that the interest for ordinary paper, having the usual time to run, such as is the custom of banks, may be taken in advance by way of discount, and not subject the paper to the taint of usury": Tyler on Usury, 298-338; 3 Parsons on Contracts, 131, 132, and note; Morse on Banks and Banking, 133; *Ticonic Bank v. Johnson*, 31 Me. 414; *Maine Bank v. Butts*, 9 Mass. 49; *Fleckner v. United States Bank*, 8 Wheat. 354; *Manhattan Co. v. Osgood*, 15 Johns. 162. Although this relaxation of the prohibition against usury was first sanctioned in the transaction of banks and other corporations authorized to make discount, a distinction could not be made against individuals, and it became universal: 3 Parsons on Contracts, 131; *Maine Bank v. Butts*, 9 Mass. 49; *Marsh v. Martindale*, *supra*; *New York F. Ins. Co. v. Ely*, 2 Cow. 708; *Cole v. Lockhart*, 2 Ind. 631; *Parker v. Cousins*, 2 Gratt. 372; 45 Am. Dec. 388.

The question has never been expressly ruled by this court.

In an action on a bond bearing ten per cent, payable semi-annually in advance, given to the commissioner of internal improvements for borrowed money, the court held the instrument void for usury. Although not decided, the principle of the cases herein cited seemed to be approved by the court, which held it inapplicable to the case under consideration, because the bond was not intended to circulate as a negotiable instrument for the benefit of trade: *Hogan v. Hensley*, 22 Ark. 413. It was not within the rule, for the further reason that the bond was not "ordinary paper, having the usual time to run, such as is the custom of banks" to deal in. As the Arkansas statute then in force was in all essential features like the similar statutes of England and the other states, which had been fully and uniformly construed, it cannot be doubted that a similar construction would have been given. The like usage certainly obtained and was acquiesced in in this state.

The first prohibition against usury in Arkansas was contained in the act of 1838. It was in force continuously until 1868. Then the administration of the state government changed hands, and a constitution was adopted which provided that no law limiting the rate of interest for which persons might contract should ever be passed. In 1874, after the administration of the government had been restored to those from whom it was taken in 1868, the present prohibition against usury was incorporated into the constitution. There was no intent to change the usury laws that for thirty years rested upon the statute-books of the state, but rather to remove the inhibition against such laws, and to restore them upon a safer, more permanent and stable basis. The clause of the constitution is no broader in its terms, and seems to reach no further in its purpose, than the act of 1838, the act of 12 Anne, or the acts of the other states upon the subject.

The framers of the constitution intended only to make the prohibition against usury, as it had formerly been understood, a part of the organic law, and not leave it to depend on the discretion of the legislators, or the chances of party ascendancy. Such being the purpose of the constitution, and such the meaning given statutes embodying its terms by previous judicial construction, it follows that it will receive the same construction placed upon the similar statutes. This conclusion receives support in the fact that the legislature meeting very soon after its adoption, dominated by the purpose that con-

trolled in its adoption, and charged with the duty of carrying it into effect, enacted the statute referred to. We consider the act valid so far as it relates to transactions of a commercial kind in short-time paper.

The appellant collected the highest lawful rate of interest; in addition to this, Smith, who acted as agent either of appellant or appellee, received a *bonus* for his services. It is controverted whether he acted as the agent of the one or of the other; this involves a question of fact to be submitted to a jury, and upon its finding would perhaps depend the decision of the case.

If he acted as the agent of the borrower alone, whether he received or did not receive a *bonus* is immaterial to the plea of usury. What the borrower pays to his own agent for procuring a loan is no part of the sum paid for the loan or forbearance of money: *Merck v. American F. L. Mfg. Co.*, 79 Ga. 213; *McFarland v. Carr*, 16 Wis. 276; *Ballinger v. Bourland*, 87 Ill. 513; *Philo v. Butterfield*, 3 Neb. 256; *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *Eddy v. Badger*, 8 Biss. 238.

If he acted as the agent of the lender, the effect is involved amid a mass of conflicting judicial utterances, embarrassing and irreconcilable.

Some courts hold that if the agent collect the *bonus* for his own exclusive benefit, and the lender receives no part of it, that this will not constitute usury, whether the lender knew of it or not: *Conover v. Van Meter*, 18 N. J. Eq. 481; *Acheson v. Chase*, 28 Minn. 211; see also *Mackey v. Winkler*, 35 Id. 513; *New England M. S. Co. v. Gay*, 32 Fed. Rep. 636.

Others hold that although the lender had no knowledge that his agent received a *bonus* from the borrower, still it will constitute usury if he did receive it: *Philo v. Butterfield*, 3 Neb. 256; *New England M. S. Co. v. Hendrickson*, 13 Id. 157; *Olmstead v. New England M. S. Co.*, 11 Id. 487; *Cheney v. White*, 5 Id. 261; 25 Am. Rep. 487; *Austin v. Harrington*, 28 Vt. 130.

We will not discuss what we deem to be obvious vices in each doctrine above stated, but announce the rule which we consider most in consonance with reason and justice, and best sustained by authority. The lender may receive for the forbearance of money ten per cent per annum, and no more. In excess of that his agent can receive no *bonus* from the borrower. If the agent do receive from the borrower a *bonus* in excess of the highest lawful interest, either with his knowl-

edge, or under circumstances from which the law will presume he had knowledge, then the transaction is usurious; while if the agent received the excessive bonus without his knowledge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious. What circumstances will raise the presumption of knowledge must be determined in each case, in accordance with the principle by which knowledge is imputed to persons in controversies generally.

We will add now that where a lender places money with an agent to be loaned, with the understanding that he must receive the highest lawful interest, and that the agent must look to the borrower for his commissions, the circumstances necessarily impute knowledge to the lender of a usurious bonus received by the agent upon each loan. And if the money was so placed, and nothing said as to the compensation of the agent, but the lender demanded for himself the highest lawful rate of interest, the same result would follow, unless the relations between the lender and his agent were such as reasonably to justify the belief that the agent would act solely for the accommodation of the lender, and without expectation of reward. It would not be right to punish the principal for the unlawful acts of his agent, done without his authority or knowledge, either express or implied; but although the acts be unlawful, if they are done by the authority or with the knowledge, express or implied, of the principal, they are the acts of the principal, for which, upon correct principle, he is and should be held responsible. To hold otherwise would be to permit the lender to exact the highest lawful interest, and the payment of a debt for which he is bound. If this could be done, why not permit the lender to collect excessive interest, and excuse his misconduct by showing that he had used the excess in paying a debt he owed? *Payne v. Newcomb*, 100 Ill. 611; 39 Am. Rep. 69; *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 Id. 165; *Rogers v. Buckingham*, 33 Conn. 81; *McFarland v. Carr*, 16 Wis. 276; *Call v. Palmer*, 116 U. S. 98.

The instructions were given under a mistaken view of the law, and state it incorrectly; for that reason, the judgment must be reversed, and the cause remanded for a new trial in accordance with the law as herein announced.

USURY. — With respect to what are usurious contracts, and the law governing such contracts, see extended note to *Davis v. Garr*, 55 Am. Dec. 391–400. The illegality of usury is dependent altogether upon statute: *Coleman*

v. Commins, 77 Cal. 548. Although the innocent purchaser of usurious securities, when such purchase was brought about by fraud, may enforce the securities against the maker to the extent of the money paid by the purchaser, with interest, yet under the usury laws he can only recover such an amount as is not usurious: *Miller v. Zeimer*, 111 N. Y. 441. Usurious interest in a judgment, which is satisfied upon the giving of a new security for the same amount, cannot afterwards be set up as a credit when suit is brought upon the new security, though in such a suit credit must be allowed for usurious interest paid upon the loan after the satisfaction of the judgment: *Colvin v. Bymer*, 121 Pa. St. 582. The payment of usurious interest is a valid consideration for an extension of time, made upon such payment, upon a promissory note: *Mann v. Brown*, 71 Tex. 241; compare *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57, and note; *Knos v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220, and note; *Mutual Nat. Bank v. Regan*, 40 La. Ann. 17; *Faught v. Rider*, 83 Va. 669; 5 Am. St. Rep. 305, and note; *Truby v. McGraw*, 118 Pa. St. 89; 4 Am. St. Rep. 575, and note; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44, and note.

USURY. — BONUS PAID TO AGENT OF BORROWER, whether it constitutes usury: Note to *Ballinger v. Bowland*, 29 Am. Rep. 70-75.

AM. ST. REP., VOL. XIV. — 6

CASES
IN THE
SUPREME COURT
OF
CONNECTICUT.

DYSON v. NEW YORK AND NEW ENGLAND R. R. Co.

[57 CONNECTICUT, 2.]

RAILROAD COMPANIES — NEGLIGENCE. — GENERAL RULE IS, THAT NEGLIGENCE CANNOT BE INFERRED from the rate of speed alone at which railway trains are run.

RAILROAD COMPANIES — NEGLIGENCE IN RUNNING TRAIN AT HIGH RATE OF SPEED OVER CROSSING. — The plaintiff's intestate was driving an omnibus on the highway, and was ran over and killed at a highway crossing by the defendant's passenger train, which was running at a high but not unusual rate of speed. The crossing was within the city limits, and the highway was much used, though the locality was not a thickly settled one, and the city, though having authority under its charter to do so, had made no order limiting the rate of speed of trains within its limits. The railroad curved as it approached the crossing, and the view was intercepted for the distance of two hundred feet on the highway, until the train was within about twenty feet of the crossing. Under this state of facts, it cannot be held that the defendant company was negligent by reason of the rate of speed maintained at the crossing.

RAILROAD COMPANIES — DANGER SIGNALS AT CROSSINGS. — RAILROAD COMPANY IS NOT GUILTY OF NEGLIGENCE in not providing, at highway crossings, additional signals to those required by statute, the statute also authorizing the railroad commissioners to require other signals at crossings when they should deem them necessary for the protection of the public. Such statute is exhaustive, and defines the whole duty of such companies in the matter to which it relates.

RAILROAD COMPANY CANNOT BE HELD LIABLE FOR INJURY CAUSED by the collision of a train, run at a high rate of speed, with a vehicle at a highway crossing, because the fireman on the train, although he saw the vehicle at some distance from the crossing, did not call the attention of the engineer to it until it was again seen just before the collision.

RAILROAD COMPANIES. — NO GENERAL DUTY RESTS UPON LOCOMOTIVE-ENGINEER in respect to a traveler whom he sees approaching a crossing. Ordinarily, he has a right to assume that the traveler will regard the

signals if they have been given, and he is only called upon to act when the traveler is so near the crossing as naturally to startle him by a sense of danger.

EVIDENCE. — **PHOTOGRAPHIC SKETCHES OF THE SCENE OF AN ACCIDENT ARE ADMISSIBLE IN EVIDENCE** as a correct representation of the locality and its surroundings, and any change in the appearance of the locality, arising from the views being taken at a different season of the year, is open to explanation.

ACTION brought by John B. Dyson, administrator of Charles Dyson, to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant, the New York and New England Railroad Company, in the running of one of its trains. The deceased, while driving an omnibus on the highway, was run over and killed at a crossing by one of the defendant's passenger trains, which, at the time of the accident, was running at the rate of about forty miles an hour. Other facts appear in the opinion. Judgment was rendered in favor of the plaintiff, and the defendant appealed.

S. E. Baldwin and E. D. Robbins, for the appellant.

C. E. Mitchell and F. L. Hungerford, for the appellee.

BEARDSLEY, J. The superior court finds that the collision which caused the death of the intestate was produced by the negligence of the defendant company, and has detailed the facts, and presumably all the material facts, upon which it formed that conclusion.

The question presented by the second assignment of errors is, whether these facts are legally sufficient to justify the finding of negligence. Such negligence is found to consist of a violation of duty by the defendant in three particulars: 1. In running its train at so high a rate of speed over the crossing in question; 2. In not protecting the crossing by a flag-man, gates, or some danger signal other than those which were employed; and 3. That the fireman on the train was negligent in not calling the attention of the engineer to the approaching omnibus.

Was the defendant company negligent by reason of the rate of speed which was maintained at the crossing? The crossing is just within the limits of the city of New Britain, and the highway which forms it is much traveled, but we infer, from the finding, and especially from the photographic sketches of the locality, that it was not surrounded by a

thickly settled neighborhood. The train in question was running at a rate of speed which, though high, cannot, at the present day, be regarded as excessive for a fast passenger train, and we infer, from the finding that trains "customarily run over the crossing at a high rate of speed," that it was not unusual.

The city of New Britain had made no order limiting the speed of trains at the crossing, though authorized by its charter to do so.

We think that the court below erred in its conclusion that it was the legal duty of the defendant company to slacken the speed of its train. As a general rule, negligence cannot be inferred from speed alone. In the case of *Warner v. New York Central R. R. Co.*, 44 N. Y. 465, the law is thus stated: "The law places no restrictions upon the rate of speed at which trains may be run across the country, at the crossings of highways, or elsewhere; nor is the train required to stop or reduce its speed at such places; . . . nor does the law subject the company to liability to damages occasioned by the rate of speed, if the signals required by law are observed." To the same effect are *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188, 192; *Chicago etc. R. R. Co. v. Lee*, 68 Ill. 576; *Chicago etc. R. R. Co. v. Harwood*, 80 Id. 88; *Grows v. Maine Central R. R. Co.*, 67 Me. 100.

It is found that the crossing was especially dangerous. It was undoubtedly so, as compared with those where the traveler upon the highway has a continuous view of the approaching train for a considerable distance. The fact that the view was intercepted for the distance of two hundred feet on the highway until the approaching train was within twenty feet of the crossing, and that the railroad curved as it approached the crossing, were elements of danger to the traveler upon the highway.

The habits of men are such that all crossings of highways by railroads at grade are practically dangerous, and it is the policy of the state to abolish them as fast as is practicable. The danger arises mainly from the forgetfulness of the railroad employees, or the inattention or temerity of the traveler upon the highway.

This danger is obviously diminished where the conditions are such that the traveler is not required to rely upon the danger signals, but can see the approaching train in time to avoid it, and the engineer can see an object at the crossing in time to

effectually reduce the speed of his train before reaching it. But such conditions are hardly the more common ones at railroad crossings in this state.

In many, if not in most, cases, the traveler must rely for his safety upon the danger signals. In the present case they were given as required by the statute, and so far as appears there was nothing to materially obstruct their sound. The cuts from four to seven and a half feet high, through which the train ran as it approached the crossing, could hardly have this effect, as in ordinary locomotives the whistle and bell are higher than that from the track. The highway was much traveled by inhabitants of New Britain and adjoining towns. It seems highly probable that if a diminished speed at this crossing was essential to the safety of travelers in the exercise of due caution, the city of New Britain would have demanded it.

A rule requiring trains to so reduce their speed before coming in view of all crossings, where the conditions are similar to those of this one, as to avoid collision with an object at or near the crossing, would seriously incommode the public, and be unnecessary for travelers exercising proper care.

Doubtless in some cases the company might be liable for the neglect of the engineer to slacken the speed of his train, if by doing so he might have avoided a collision; as if he was informed that a person was approaching a crossing in such a condition or under such circumstances as to indicate that he was heedless of the danger signals, as if other sounds were prevailing, as of a thunder-storm, which might render the sound of the signals indistinguishable. In such cases the company might properly be charged with the consequences of the personal negligence of the engineer.

Nor do we think that the defendant was guilty of negligence in not providing at the crossing additional signals to those required by statute. In this state the legislature has assumed the regulation of this matter by providing specifically what signals shall be given of the approach of trains to crossings, and by instructing the railroad commissioners to require other signals at crossings when they shall deem them necessary for the protection of the public. This legislation is exhaustive, and defines the whole duty of railroad companies in the matter to which it relates: *Weber v. New York Central R. R. Co.*, 58 N. Y. 451; *Pakalinsky v. New York etc. R. R. Co.*, 82 Id. 424; *State ex rel. Fey v. Philadelphia etc. R. R. Co.*, 47 Md. 76; *Haas*

v. *Grand Rapids etc. R. R. Co.*, 47 Mich. 401; *Cliff v. Midland R'y Co.*, L. R. 5 Q. B. 264.

Nor do we think that, upon the facts found, the company should be held liable because the fireman did not sooner tell the engineer of the approach of the omnibus. No general duty rests upon the engineer in respect to a traveler whom he sees approaching the crossing, and of course none upon the fireman. Ordinarily, he has a right to assume that he will regard the signals if they have been given, and is only called upon to act when the traveler is so near the crossing as naturally to startle him by a sense of danger. The distance of the omnibus from the crossing when seen by the fireman is not found distinctly, but the inference from the finding is that it was at least two hundred feet, as it is found that for that distance the intestate could not see the train until he came to the company's right of way, and the engineer from his post on the locomotive could not see the omnibus. If this inference is the correct one, the lad must have driven rapidly from that point to the crossing to have met the train, which was about six hundred feet from the crossing when the fireman saw the omnibus, — much more rapidly than he was driving when he started, or when he was last seen. But if the horses were driven for the two hundred feet at the same rate as when seen by the witnesses, the probable distance of the omnibus from the crossing when the fireman saw it was about eighty feet. If this was so, we cannot say that he was in fault in not instantly calling the attention of the engineer to it. It is not unusual for prudent persons driving horses accustomed to trains to approach as near as or nearer than this to crossings when a train is about to pass.

This view of the case renders it unnecessary to consider the other questions presented by the assignment of errors.

We refer, however, to the objection made by the defendant to the photographic sketches offered in evidence by the plaintiff, as it presents a question of evidence which has not hitherto been passed upon by this court. The court properly overruled the objection. The pictures represented the crossing in question and its surroundings, and presumably the court below found that it was a correct representation of them; the change in the appearance of the locality made by the falling of the leaves from the trees was of course open to explanation: *Marcy v. Barnes*, 16 Gray, 161; 77 Am. Dec. 405; *Randall v. Chase*, 133 Mass. 210; *Ruloff v. People*, 45 N. Y. 213; *Church v. City of Milwaukee*, 31 Wis. 512; *Abbott's Trial Evidence*, 102.

There was error in the judgment appealed from, and it is reversed.

RAILROADS. — DUTY OF TRAVELERS UPON RAILROAD TRACKS OR CROSSINGS: See *Durbin v. Oregon R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and particularly cases cited in note 786. Ordinary care and prudence must be exercised by a person approaching a railway crossing: *Dallas etc. R'y Co. v. Able*, 72 Tex. 150; and ordinary care requires looking up and down the track for approaching engines: *Hamilton v. Delaware etc. R. R. Co.*, 50 N. J. L. 263; *Galveston etc. R'y Co. v. Kulac*, 72 Tex. 644; *Trousclair v. Steamship Co.*, 80 Cal. 521. And where a railroad company and the public both use a street, the railroad company must keep a lookout for persons upon its track, and the travelers in the street must keep a lookout for approaching trains: *Keown v. St. Louis etc. R'y Co.*, 96 Mo. 290.

RAILROAD CROSSINGS. — DUTY OF COMPANY WITH RESPECT TO PERSONS UPON OR APPROACHING CROSSINGS: See cases cited in note to *Durbin v. Oregon R. R. & Nav. Co.*, 11 Am. St. Rep. 786; *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708; 13 Am. St. Rep. 84, and particularly cases cited in note 93, 94. The duty of those in charge of a railroad train to stop it on account of the nearness of one about to cross its track, or of one who is upon the track, does not arise until it appears that such person intends to go upon the track in front of the approaching train: *Railway v. Kuehn*, 70 Tex. 583; compare *East Tennessee etc. R'y Co. v. Winters*, 85 Tenn. 240. The fact that the public, without protest from the railroad company, habitually crossed its track at a place other than a regular street or highway crossing imposes upon the company a degree of care greater than at a place where there is merely an occasional crossing or none at all: *St. Louis etc. R'y Co. v. Croesnoe*, 72 Tex. 79. A railway company may set up as a defense that its gates at a crossing were left open by the land-owner or some other wrong-doer other than one of the company's employees: *Chicago etc. R'y Co. v. Barnes*, 116 Ind. 126. But contributory negligence upon the part of one who is injured will ordinarily preclude his recovery, although the defendant was also guilty of negligence: *Trousclair v. Steamship Co.*, 80 Cal. 521; but if an engineer knows that the whistles and bells are insufficient to warn a traveler upon the track of his danger from the approaching train, and he is able to stop the train, and recklessly fails to do so, the contributory negligence upon the part of such traveler will not avail against such conduct on the part of the engineer: *Bowmeester v. Grand Rapids etc. R. R. Co.*, 67 Mich. 87.

RAILROADS — NEGLIGENCE BY REASON OF UNDUE SPEED. — Ordinarily, the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by the ordinances of such city is negligence *per se*: *Schlereth v. Missouri P. R'y Co.*, 96 Mo. 509; *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note 883; and it is always at least a circumstance for the jury to consider in determining whether the railroad company was or was not guilty of negligence: *Union Pac. R'y Co. v. Rasmussen*, 25 Neb. 810; 13 Am. St. Rep. 527, and note 532; *Blanchard v. Lake Shore etc. R'y Co.*, 125 Ill. 416; 9 Am. St. Rep. 680. Railroad companies, in the absence of statutes forbidding it, may run trains off schedule time, and at increased rates of speed, and doing so does not constitute negligence *per se*: *East Tennessee etc. R. R. Co. v. Winters*, 85 Tenn. 240.

EVIDENCE — PHOTOGRAPHS. — As to the admissibility of photographs as evidence: *Nborn v. Zimpelman*, 47 Tex. 503; 26 Am. Rep. 315, and extended note 319-321.

SHONINGER v. PEABODY.

[57 CONNECTICUT, 42.]

AGENCY — PRINCIPAL IS REQUIRED TO AFFIRM OR REPUDIATE CONTRACT OF AGENT IN ITS ENTIRETY. — Where an agent sells the goods of his principal at an agreed price, to be paid for in services to be rendered to the agent by the purchaser, and the principal, with full knowledge of the facts, sues the purchaser in *assumpsit* for the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price. In such case, the principal might repudiate the entire contract, and recover the goods in an action of replevin, or their value in an action of trover, but he cannot adopt the contract in part without adopting it wholly.

ACTION of *assumpsit*, brought by Shoninger and another against Peabody, to recover for the price of a piano sold. The facts appear in the opinion. There was a judgment for the plaintiffs, and the defendant appealed.

J. O'Neil and C. A. Colley, for the appellant.

S. W. Kellogg and J. P. Kellogg, for the appellees.

LOOMIS, J. The plaintiffs have been for many years dealers in musical instruments at New Haven, with a branch store at Waterbury, which, from 1880 to October, 1886, was under the sole charge and management of one Henry R. Day, the general agent of the plaintiffs. Day was paid a regular salary, and received, in addition, a commission on all sales made by him for the plaintiffs. While acting as such agent he sold from the store in Waterbury one of the plaintiffs' pianos to the defendant for the agreed price of three hundred dollars, which was agreed to be paid for wholly by certain commissions that might become due from Day to the defendant on future stock transactions between the defendant and Day on his private account. The defendant has been for a considerable time engaged in the business of a stock-broker, and as such had had previous dealings with Day. The plaintiffs had no actual knowledge of the sale of the piano until after Day had left their employment. He had reported to them that the piano was rented to the defendant. But the finding is explicit that the plaintiffs were informed of the terms of the sale after Day left their employ, and before the bringing of this suit. The defendant earned commissions in his stock transactions on Day's account to the amount of \$185, which were credited by Day on the piano account, but not paid over to the plaintiffs. In the year 1886 the defendant paid the plaintiffs several

sums, aggregating seventy-five dollars, which is all the plaintiffs ever received towards the price of the piano. Day was a defaulter in his dealings with the plaintiffs to an amount exceeding five thousand dollars.

The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. But the greatest good to the greatest number requires adherence to sound general principles, even though in a given case a party may fail in obtaining redress. The whole trouble in this case arises from a mistake as to the plaintiffs' remedy.

When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in *assumpsit* on the contract for the agreed price, and thereby they affirmed the contract, and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law, a subsequent ratification and adoption of an act has relation back to the time of the act, and is tantamount to a prior command: 1 Am. Lead. Cas., 4th ed., 592.

The argument for the plaintiffs (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part; that is, that the contract is to be treated as good for the agreed price, but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety: *Shepard v. Palmer*, 6 Conn. 100; *Newell v. Hurlburt*, 2 Vt. 351. See also the cases hereinafter cited.

There was no contract at all relative to the piano except the one made by Day as their agent; and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular, both as to price and as to the terms of paying the price.

The leading case on this subject is *Smith v. Hodson*, 4 Term Rep. 211, where it was held that if a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover

the value of the goods in trover; but if they bring *assumpsit*, they affirm the contract with all its incidents, so that a creditor may even set off his debt; and the principle established in that case has ever since been considered to rest upon an impregnable foundation, that the existence of the contract could not be affirmed to promote the purpose of a recovery, and at the same time be treated as a nullity in order to shut out the opposite party from a defense otherwise open to him.

In *Butler v. Gable*, 1 Watts & S. 108, the trustees in a domestic attachment, which is a proceeding in the nature of a commission of bankruptcy, sued the defendant in *assumpsit* for the amount of a check, which had been transferred to him by the party against whom the attachment issued subsequently to its date, and relied on the invalidity of the transfer as ground of recovery. But it was held by the court that, whatever the result might have been had the action been laid in tort, the necessary result of laying it in contract was to affirm the transaction on which it was founded, and entitle the defendant to show that he had received the check in payment of a debt.

For the same reason, it has long been held that a principal who seeks to enforce a sale made by his agent cannot ordinarily allege that the agent exceeded his instructions in warranting the goods, because he must accept the contract as a whole if he means to rely on any portion.

The general consensus of judicial opinion in the United States is in perfect accord with the authorities cited from the English courts. We will select a few only of the numerous cases affirming the principles upon which we base our opinion.

One of the most recent cases is that of *Billings v. Mason*, 80 Me. 496, decided in August, 1888. The case is stated by Danforth, J., in giving the opinion of the court, as follows: "The action is *assumpsit* upon an account annexed. The defendant admits that he received from the plaintiff the goods charged, and makes no question as to the prices. This makes a *prima facie* case against him; and though technically it does not change the burden of proof, it devolves upon him, if he would avoid the responsibility, to give some reason why. The explanation offered by the defendant is, that though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element of which was

that certain goods of a like kind, which the defendant then had, should be taken in payment. This agreement with the agent is not questioned, but the answer to it is twofold: 1. That the agent had no authority to make such a contract; and 2. That the contract under which the action is sought to be maintained was made directly with the plaintiff, though in some degree through the instrumentality of the agent. Assuming, under the first, that the agent had no authority to make the contract he did,—and the evidence is quite conclusive upon that point,—still it does not change the conceded fact that he not only assumed the authority to do so, but did actually make such a contract. Waiving for the moment the second point raised, this was the only contract having the assent of the defendant,—the contract under which he acted, and by virtue of which he obtained the goods. It is quite clear that the plaintiff cannot hold him upon a contract he did not make, or repudiate the contract in part, and hold the remainder valid: *Brigham v. Palmer*, 3 Allen, 450. Nor can he be holden upon an implied contract, for that is excluded by the express."

In *Smith v. Plummer*, 5 Whart. 89, 34 Am. Dec. 530, a contract made for the benefit of the defendants was held to have been ratified by their giving it in evidence as a defense in a suit brought contrary to its terms.

In *Beidman v. Goodell*, 56 Iowa, 592, an agent for the owner of a note and mortgage took new notes for the debt, and in consideration of their being signed by the wife of the maker, who was not a party to the former note, agreed (without the authority of his principal) to cancel the mortgage. His principal, having brought a suit and taken judgment against the makers of the new notes, was held to have ratified the agreement, so that he could not enforce the mortgage, which at the time was improperly canceled.

In *Peninsular Bank v. Hanmer*, 14 Mich. 208, a contract was entered into by the cashier in behalf of the bank, by which security was given by a debtor on long time to a creditor, in the interest and on motion and arrangement of the cashier, who, in order to procure the assent of the creditor, without authority from the bank, made and delivered a bond of indemnity against a prior mortgage on the property covered by the collateral security. The bank received the benefit of the transaction, and defended the creditor against a suit to foreclose the prior mortgage. It was held that, having appropri-

ated the benefits, the bank must affirm or rescind *in toto*; that it could not disaffirm as to those parts which impose an obligation, and affirm it so far as it operated to its advantage, and that the entire arrangement was ratified.

In *Whitlock v. Heard*, 3 Rich. 88, the plaintiff was a carriage-maker, and his shop was under the management of W., as his foreman. W. owed the defendant by note, and made and delivered to her a buggy belonging to the plaintiff, in exchange for the note. The plaintiff, on hearing of this, disapproved of the arrangement, and brought his action for the price, alleging it to have been sold. It was held that he could not recover; that, regarding him as having adopted the contract, he would then be only entitled to the note; regarding him as having repudiated the contract, there would then be no sale of the buggy, and that his remedy was, after demand, to bring trover.

In *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227, 79 Am. Dec. 787, an agent was intrusted with chattels for a certain specified purpose; he wrongfully sold the goods, and received payment in money. The principal brought an action of *assumpsit* against the purchaser for the price. It was held that he could not recover in *assumpsit*, the purchaser not having sold the property and received the money for it, but that the plaintiff might have recovered in an action of tort. The same principle is recognized in *Jones v. Hoar*, 5 Pick. 285. In the case at bar, there is no claim that the defendant had sold the piano.

In *Butler v. Hildreth*, 5 Met. 49, an insolvent conveyed away his property in fraud of his creditors. The trustee brought a suit against the purchaser to recover the value of the property; then he discontinued that suit, and brought an action to set aside the sale on the ground of fraud. It was held that, having brought an action *ex contractu*, the sale was affirmed, and the latter action could not be maintained.

In *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131, the defendant purchased goods from A, as agent of the plaintiff, who brought an action and recovered judgment for the price. Afterwards the plaintiff disavowed the agency and brought replevin for the goods. It was held that the record of the former judgment was conclusive as an affirmation of the sale.

A vast number of other cases establishing the same principles might be cited, but the above will suffice. No conflicting

cases were cited by the plaintiffs, unless *Stewart v. Woodward*, 50 Vt. 78, 23 Am. Rep. 488, and *Squires v. Barber*, 37 Vt. 558, are to be so regarded.

In the first of these cases, an agent of the plaintiffs, who were merchant tailors, owed the defendant, who was a physician, a private debt for medical services for himself and family, and being unable to pay money, persuaded the defendant to take a suit of clothes out of the plaintiffs' shop in part payment, which was done. The court allowed the plaintiffs to recover of the defendant the price of the suit in an action of book-debt, on the ground that the act of the defendant in receiving and converting the goods to his own use raised an implied promise to pay for them. The opinion of the court is very brief, and contains no discussion as to the form of remedy, and no reference to the authorities generally. As to the form of remedy, it is manifestly difficult to reconcile the case with some others we have cited. In regard, however, to the question whether the suit would be effectual as a ratification of their agent's act, we suggest this distinction: that the act of the agent in paying his private debt with the plaintiffs' goods could not, perhaps, be regarded as an act done for or in behalf of the principals at all, nor even in the principals' name, and was not properly a contract of sale at all, so that there was no express contract to be affirmed by the bringing of the suit, and nothing to prevent the raising of the implied promise except the fact that the defendant had not sold the goods and received money thereon. It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind.

The other case cited from 37 Vt. 558, was very similar in the principles that apply. An agent of the plaintiffs, who had authority to sell their goods, became insolvent, and owing the defendant a private debt, undertook to pay it out of the plaintiffs' goods, the defendant being charged with knowledge of all the circumstances at the time. The plaintiffs sued in *assumpsit*, and the defendant, instead of denying the plaintiffs' claim, undertook merely to set off the debt against their claim, which, of course, could not be done.

There is error in the judgment complained of, and it is reversed.

AGENCY — RATIFICATION OF AGENT'S ACTS. — A principal's ratification of the acts and contracts of his agent must be *in toto*; he cannot ratify a part and repudiate a part of an unauthorized contract made by the agent: *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419; *Smith v. Smith*, 80 Cal. 323; *Nichols v. Shafer*, 63 Mich. 599.

LANE'S APPEAL FROM PROBATE.

[57 CONNECTICUT, 182.]

STATUTES — CONSTRUCTION. — FUNDAMENTAL CANON OF CONSTRUCTION IS, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature.

WILLS. — VALIDITY OF EXECUTION OF WILL IS TO BE DETERMINED by the law in force at the time of its execution, and not by the law in force at the death of the testator, unless the later law is clearly retrospective.

APPEAL from a probate decree approving and allowing an instrument purporting to be a will. The opinion states the case.

J. Halsey and M. A. Shumway, for the appellant.

J. H. Potter, for the appellee.

LOOMIS, J. In January, 1879, Mrs. Hannah P. Dimick made and executed what purported to be her last will and testament. It was first signed by her in the presence of only one witness, and subsequently taken to the second witness, and after that to the third, each of whom signed as a witness in the absence of the other two. This paper remained without change until the death of the testatrix, on the sixth day of February, 1888, and afterwards, on the third day of March, 1888, the same was presented to the probate court, and there approved as her last will and testament. Upon appeal to the superior court the decree of the probate court was reversed, and the appellee now brings the case to this court for the revision of alleged errors in the superior court.

The sole question is, whether the instrument was invalid as a will for want of proper attestation. The answer depends upon the construction and effect of our statutes relating to the execution and attestation of wills.

The difficulty, however, is not so much in determining the meaning of our statutes as in ascertaining which of two different statutes applies. If we take the statute in force when

the instrument was executed, which positively required the witnesses to sign in the presence of each other and of the testator, the attestation was clearly contrary to law, and the will was void. If, on the other hand, we take and apply the statute as it stood at the decease of the testatrix, which was first passed in 1885, the attestation was legal, and the instrument valid as a will.

The statute in force when the will was attested provided that "no will or codicil shall be valid to pass any estate, unless it be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other; but no will of personal estate made before the twenty-seventh day of June, 1848, shall be invalid if not so attested; and all wills executed according to the laws of the state or country where they were executed may be admitted to probate in this state": Gen. Stats. 1875, p. 369, sec. 2.

The statute in force at the death of the testatrix provided that "no will or codicil shall be valid to pass any estate, unless it be in writing, subscribed by the testator, and attested by three witnesses, each of them subscribing in his presence; and all wills executed according to the laws of the state or country where they are executed may be admitted to probate in this state, and shall be effectual to pass any estate of the testator situated in this state": Gen. Stats. 1888, sec. 538.

As a will is ambulatory during the lifetime of the one executing it, and no rights can vest under it till the death of the testator, it must be conceded to be within the rightful authority of the legislature, until the death of such testator, by retroactive legislation to change the formalities previously prescribed for the due execution of wills, and to affect every instrument previously executed, making it valid or invalid as the case may be. But it is one of the fundamental canons of construction accepted everywhere, and most firmly held by this court, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature: *Brewster v. McCall's Devises*, 15 Conn. 274; *Goodsell's Appeal from Probate*, 55 Id. 171.

In the light of this well-settled rule, it would seem impossible to give the last-mentioned statute a retroactive operation; for not only is such intent not made clear, but the contrary more clearly appears. All the provisions look forward, rather

than backward. But suppose the act is not clear either way, are there any other principles which may control and enable us to determine whether the validity of the execution of a will should be determined by the law existing at the execution, or as it was at the death of the testator?

Upon this question there is a disagreement among the authorities, to which we may hereafter refer, but at present we will look only at the reasons for the differing opinions. The reasons for applying the later statute, stating them as strongly as possible, are as follows: "As until the death of the testator the paper executed by him, expressing his wishes, is not a will, but a mere inchoate act which may or may not be a will, the law in force at the testator's death applies, and controls the proof of the will": *Sutton v. Chenault*, 18 Ga. 1. This, in substance, is the reasoning of all the courts that have accepted the doctrine that the validity of a will must be determined by the law existing at the death of the testator.

But as plausible as the reasoning may seem, we think it is fallacious, at least as applicable to our laws. The act of bequeathing or devising is something more than inchoate or ambulatory. On the other hand, it becomes a completed act when the will is executed and attested according to law, although it does not take effect on the property till a future time. A power of revocation is retained for life, but even that, to be effectual, must be exercised in the way and manner prescribed. What need could there be of any revocation, with prescribed formalities, if the executed paper is to be considered only as an expression of the signer's wish, and is in no sense a will? The latest wish, however expressed, ought to overcome the former.

The theory of our statutes seems to us directly opposed to the reasoning referred to, however it may be with the statutes of other jurisdictions. Certain formalities of execution and attestation are prescribed as prerequisites to the validity of a will, and without compliance with which it is no will at all, although it is clearly a wish. In terms, it is declared to be incompetent to pass the title to property at the death of the testator. The precise language is: "No will or codicil shall be valid to pass any estate, unless," etc. So that our statute amounts to a positive rule for the transmission of property, which must be complied with, as a complete act at the time of execution, or never, so far as the act of the testator is concerned. And what the statute makes positively bad can

only be made good by positive legislation manifestly retrospective.

Our law, in effect, says to every person who would make a valid disposition of his property by will that he must observe the specified formalities, and if he complies, it contains an implied assurance that he shall not be disappointed and defeated in his purposes by any subsequent change, unless the new law clearly affects wills previously made.

That such is the true theory of our statutes is rendered still more manifest, we think, by reference to the provision, which has for more than a century existed, that at the time of executing a will, or at any time during his life, the testator may obtain the affidavit of the witnesses of the facts required to prove it in court, which, having been written upon or attached to the will, "shall be accepted by the court of probate as if it had been taken before said court": Gen. Stats. 1784, p. 264, and of 1888, sec. 545. It has thus been the settled policy of our law, in effect, to assure the person who executes a will, not only that the prescribed formalities shall be sufficient and controlling, but that even the evidence of the proper execution shall be sufficient finally to establish it, though many years shall have intervened. Under such a system, surely it cannot be said that what the testator has thus prepared for his will is only a mere paper upon which he has indicated simply his wishes at the time as to the final disposition of his property.

If we have rightly apprehended the true theory of our statute laws, no further vindication of the ruling of the superior court is necessary. If, however, our views find confirmation in the decisions of the courts of other jurisdictions, we may well feel greater assurance that we are right.

This subject has not been much discussed in the courts of the United States, and the few decisions that may be found on the subject are not harmonious, as we have before stated. The text-writers make only a brief reference to the question. Of these, Jarman and Redfield favor the doctrine that the law existing at the death of the testator controls, rather than that at the date of execution: 1 Jarman on Wills, 337; 1 Redfield on Wills, 4th ed., 408. In 1 Williams on Executors, 4th ed., 94, note, the question is left as doubtful. In Schouler on Wills, section 2, and in 1 Revision of Swift's Digest, 140, the contrary view is held.

The courts of New York, South Carolina, and Georgia adopt

substantially the proposition as laid down by the text-writers first mentioned: *Lawrence v. Hebbard*, 1 Bradf. 252; *Houston v. Houston*, 3 McCord, 491; 15 Am. Dec. 647; *Elcock's Will*, 4 McCord, 39; 17 Am. Dec. 703; *Sutton v. Chenault*, 18 Ga. 1; *Hargroves v. Redd*, 43 Id. 142.

But the courts of England, and of Vermont and Pennsylvania, have adopted substantially the principles for which we contend: *Downing v. Townsend*, Amb. 280; *Gillmore v. Shooter's Ex'r*, 2 Mod. 810; *Giddings v. Turgeon*, 58 Vt. 106; *Mullen v. McKelvy*, 5 Watts, 399; *Taylor v. Mitchell*, 57 Pa. St. 209.

The difference of opinion referred to may perhaps be attributed in some measure to a difference in the language and theory of the local statutes. For instance, in *Lawrence v. Hebbard*, *supra*, the surrogate, while he adopts the line of reasoning referred to as contained in *Sutton v. Chenault*, *supra*, yet he emphasizes the fact that the statute of New York, in terms, refers to wills previously executed, and says they shall not be made void, and thereby contains an implication that they may be made good by the latest statute, and so the court holds.

The courts of South Carolina confine their decisions to wills of personal property. Referring to the distinction between wills as to personal and real estate, they intimate that as to the latter the law existing at the date of execution may possibly control, upon the ground that to transfer the title to real estate the existing statutory regulations may possibly control. But our statute practically abolishes any such distinction by putting wills of personal estate upon the same ground as those affecting realty, so far as the formalities of the execution of the will are concerned; the language being, "no will shall be valid to pass any estate," unless, etc.

The counsel for the appellee contended that the case of *Giddings v. Turgeon*, 58 Vt. 106, had no application, because the question there was so different from the one in the case at bar. While conceding the difference between the two cases, we still think the principle adopted by the court is applicable. The validity of the entire will was there under consideration, in which one of the legatees was a married woman, whose husband was one of the witnesses to the execution of the will. As the law of Vermont then stood, he was incompetent as a witness, and it was improperly attested. By a subsequent act, however, a husband was made a competent witness, where a legacy had been given to his wife, to prove

and establish the will, although the legacy to the wife would not be good. It was contended that the subsequent law would apply, but the court held that the will was not good, because it must be proved as the law required at the time of its execution, which is the principle contended for here.

In *Taylor v. Mitchell*, 57 Pa. St. 209, the point made was, that the will there in question was void under the statute in force when the testator died. The case was very well considered, and in the opinion of the court, by Sharswood, J., it is said: "Retrospective laws generally, if not universally, work injustice, and ought to be so construed only when the mandate of the legislature is imperative. When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his lawful right of disposition to apply to it a rule subsequently enacted, though before his death. While it is true that every one is presumed to know the law, the maxim, in fact, is inapplicable to such a case; for he would have an equal right to presume that no new law would affect his past act, and rest satisfied in security on that presumption. . . . It is true that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time."

No case hitherto has been before this court involving the precise question now under consideration, but analogous questions have been discussed in several cases, and principles applied to them which naturally and logically lead to the result we have reached in this case.

In *Brewster v. McCall's Devisees*, 15 Conn. 274, one question was, whether the will, executed in 1826 by a person who died in 1838, could convey real estate purchased after the will was executed, and before the act of 1831, which provided for the devising of real estate not owned by a testator at the time of executing his will, but acquired afterwards. The court, in refusing to apply the act existing at the death of the testator, said: "The general rule is, that statutes shall not be construed retrospectively, unless by their express terms or otherwise such appears to be the manifest intent of the legislature. . . . Here there is nothing from which we have a right to

infer that it was intended to affect any wills which had been executed prior to the passing of the act."

In *Gaylor's Appeal from Probate*, 43 Conn. 82, the question was, whether, under the statute existing when the will was made (Gen. Stats. 1866, p. 402), witnesses must subscribe in the presence of each other. Carpenter, J., in giving the opinion of the court, says, on page 85: "The language of our statute existing when the will was made is explicit, and entirely free from ambiguity. It only requires that all the witnesses shall subscribe their names in the presence of the testator. . . . In the revision of 1875 we find, in addition to the statute as it previously existed, the clause inserted, 'and in the presence of each other.' But that cannot affect the validity of any will previously executed."

In *Goodsell's Appeal from Probate*, 55 Conn. 171, the will was made in January, 1871, and the testator married in May following, and died in 1886, leaving a widow, but no child had been born to him. When the will was executed, and when the marriage took place, the common law was in force, which required both a subsequent marriage and the birth of a child to revoke a will. In 1885 an act was passed providing that "if after the making of a will the testator shall marry, or if a child is born to the testator and no provision is made in the will for such a contingency, such marriage or birth shall operate as a revocation of such will." It was held that the latter statute did not apply, and that, "as a rule of interpretation, all statutes are to operate prospectively, unless they contain language unequivocally and certainly retrospective."

For the foregoing reasons, we conclude there was no error in the judgment of the superior court.

STATUTES — RETROSPECTIVE OPERATION. — A statute must never be given a retrospective effect, unless its language expressly requires it: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *Richmond v. Henrico County*, 83 Va. 204; *McCarthy v. Havis*, 23 Fla. 508; *Russell etc. District v. Benson*, 125 Ill. 490; *Goodsell's Appeal*, 55 Conn. 171; compare *Connecticut Mutual Life Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and note; *Fitzpatrick v. Board of Trustees*, 87 Ky. 133. The word "hereafter," occurring in a statute, makes it prospective in its operation: *State v. Hicks*, 48 Ark. 515. There is a want of harmony in the application of this rule to the formalities required for the due execution of wills. In our judgment, the better view is that a will ought to be regarded as taking effect, or rather as consummated, at the death of the testator, and not before, and therefore as valid as if executed and attested in conformity with the laws in force at the date of such death, though not in conformity with the statutes existing when it was in fact signed, published, and attested: *Elcock's Will*, 4 McCord, 39; 17 Am. Dec. 703.

JOHNES v. BEERS.

[57 CONNECTICUT, 205.]

WILLS — CONSTRUCTION AND EFFECT. — In the absence of a clear manifestation of intent on the part of a testator to postpone to an uncertain and possibly distant time after his death the vesting of the title to his estate in his children, the law prefers, and presumes that he intended, that it should vest at the moment when the will should become operative.

WILLS — CONSTRUCTION. — RULE IS WELL ESTABLISHED, that where there is a bequest or devise to A, and in case of his death to B, if A survives the testator, he takes absolutely, there being nothing else in the will decisive of the matter. And where a testator left part of his estate in trust for the use of his widow for life, and after her death to be converted into money and divided equally among his children, and in case of the death of any of his children, the share of the decedent to go to his or her issue, or if there were no issue, then to the surviving children or their issue, it was held that the general rule applied, and the children of the testator surviving him took their shares absolutely, subject to the life use of his widow.

WILLS — CONSTRUCTION. — A testator left the residue of his estate in trust for his four children, to be converted into money upon his decease and divided equally among them, and if either of his children should die "before he or she shall have received his or her share," then such share to go to his or her lawful issue, or if there was no issue, then to the surviving children, or their issue, if deceased. In such case, the words: "shall have received" are to be interpreted as meaning "shall have become entitled to receive by surviving me"; and the children surviving the testator are entitled to take absolutely at his death.

WILLS — WHEN ESTATE VESTS IN DEVISEE. — In common understanding, the devisee of an estate in fee-simple absolute "receives" it at the moment of the testator's death, although the enjoyment may be postponed to a future time.

SUIT for the construction of a will. The facts appear in the opinion.

J. H. Perry, for Henry J. Beers.

G. Stoddard, for Julia A. Beers.

PARDEE, J. Henry J. Beers executed his will in 1882, and died in 1884; his wife, one son, William A. Beers, and three daughters surviving. After giving to his wife the use of certain lands for life, the will proceeds as follows:—

"*Fifth.* I order and direct my executor and trustee, hereinafter named, to collect and set apart from my estate securities producing interest of the par value of the sum of seventy-five thousand dollars, and to collect and receive and pay the income derived therefrom, as fast as the same shall be received, to my said wife so long as she may live. . . .

"*Seventh.* Immediately upon the death of my said wife, or if she should die before me, then upon my decease, I order and direct my said executor and trustee to turn said aforementioned real and personal property into money, and to divide the same into four equal parts, and pay one part thereof to my son, William A. Beers, one part to my daughter Mary B. Johnes, wife of Goldsmith D. Johnes, one part to my daughter Addie Curtiss, wife of Henry W. Curtiss, and the remaining part to my daughter Elizabeth G. Alsop, wife of Charles R. Alsop. In case of the death of any of my said children, I order and direct that the part of him or her so dying be paid to his or her lawful issue; and in case he or they shall die without leaving any lawful issue, to pay and divide the part of him or her so dying to and amongst my surviving children and the lawful descendants of any of my said children, William, Mary, Addie, and Elizabeth, who may have deceased, such descendants of children to receive *per stirpes*, and not *per capita*.

"*Eighth.* For the purpose of carrying into effect the aforementioned purposes, I give, devise, and bequeath to my said executor and trustee all of my said aforementioned real and personal estate, in trust, however, giving and granting unto him full power and authority to sell and convey the same to effectuate the purposes of this my will.

"*Ninth.* All the rest, residue, and remainder of my estate, both real and personal, and wheresoever the same may be situated, and the rents, issues, and profits thereof, I give, devise, and bequeath to my executor and trustee, hereinafter named, in trust, nevertheless, upon my decease to convert the whole thereof into money, and to divide the same into four equal parts, and to pay one equal part thereof to my said son, William A. Beers, absolutely, one part thereof to my said daughter Mary B. Johnes, absolutely, one part thereof to my said daughter Addie Curtiss, absolutely, and the remaining part to my said daughter Elizabeth G. Alsop, absolutely. In the event of the death of either of my said children before he or she shall have received his or her share, then to pay the share of him or her so dying to his or her lawful issue. In case he or she shall die without leaving lawful surviving issue, then to pay the part of the one so dying to my surviving children, and to the issue of such of my said children, William, Mary, Addie, and Elizabeth, who may have died, such issue to take *per stirpes*, and not *per capita*."

Goldsmith D. Johnes, the husband of the testator's daughter Mary, was made executor and trustee. As such, he asked the superior court for instructions as to his duty in the matter. In his compliant, he alleges, among other things, as follows:—

“Since the death of said testator, and on the ninth day of December, 1887, William A. Beers died, leaving him surviving his widow, Julia A. Beers, and one son, Henry J. Beers.

“William A. Beers bequeathed and devised all his estate to Julia A. Beers, his widow.

“Prior to the death of William A. Beers, the plaintiff, as executor and trustee, in accordance with the ninth section of the will, converted into money, and paid over to the parties entitled thereto, all the residue and remainder therein referred to, except a lot of land in Fairfield, known as corner lot, appraised at \$2,500, and notes for \$666.66, secured by a mortgage on a farm in Indiana, and about \$164.50 in cash, as appears by the administration accounts rendered to the probate court by the executor, the last thereof having been rendered February 18, 1888.

“From the date of the probate of the will of Henry J. Beers to the date of the death of William A. Beers, the corner lot was in the possession and control of the plaintiff, as executor and trustee.

“The mortgage and cash represent the proceeds of the sale of a certain farm, owned by Henry J. Beers, in the state of Indiana, which was sold by the executor prior to the death of William A. Beers, and a portion of the cash proceeds derived therefrom divided among said legatees and devisees, including William A. Beers.

“Prior to his death, William A. Beers requested the executor to convert the corner lot into cash, provided that it could be done without selling the same at a sacrifice, and distribute the proceeds thereof among said legatees and devisees; but the executor could not realize such price therefor as was believed by all the heirs to be sufficient and proper, and for the best interests of all concerned therein, although he endeavored so to do, and therefore the lot was not sold.

“The mortgage was taken by the executor to secure a portion of the purchase-money of the farm so sold as aforesaid by him.

“In accordance with the fifth clause of the will of Henry J. Beers, interest-producing securities of the par value of seventy-

five thousand dollars were set apart by the executor, the income derived therefrom to be paid to Priscilla A. Beers, his widow, during life. She is still living.

“Various questions have arisen, and various claims have been made by the different persons hereinbefore named, relative to the construction and legal effect of certain of the provisions and trusts in said will contained, among which are the following:—

“1. Whether the cash in the hands of the executor and trustee, and the proceeds arising from the note and mortgage and the corner lot, are to be paid to Henry J. Beers, the sole surviving issue of William A. Beers, or to Julia A. Beers, as executrix and sole legatee and devisee under the will of William A. Beers.

“2. Whether, in the event of the death of Priscilla A. Beers, the share which William A. Beers would have taken, if living, of the real and personal estate devised and bequeathed in the second, third, and fifth sections of said will for the benefit of Priscilla A. during her life, shall be paid to Henry J. Beers or his heirs, or to Julia A. Beers or her heirs.”

The questions are reserved for the advice of this court.

The cited clauses make it quite certain that it was the intention of the testator to give his entire estate to his children absolutely,—the whole of it in right at his death; the possession and enjoyment of a part then, of the remainder at the death of his wife.

At the execution of the will it was of course unknown whether any one of his children would survive him; unknown, in case the death of any one preceded his own, whether that one would or would not leave a child or children surviving.

Therefore, that he might die testate as to all of his estate, and might avoid the necessity for another will, he so framed this as to meet the possibilities in this regard.

In the absence of a clear manifestation of intent on the part of a testator to postpone to an uncertain and possibly distant time after his death the vesting of the title to his estate in his children, the nearest objects of his love and bounty, the law prefers, and presumes he intended, that it should vest at the moment when the will should become operative.

Of course the testator was well aware of the possibility of long delay in the satisfactory conversion of the entire assets of an estate into money, in adjusting claims against it, and in reaching the point of final distribution. But unless he

so says explicitly, it cannot be presumed to be his will that either unavoidable or permitted delays should put it in the power of an executor to carry to a grandson an estate which he intended for his son.

There is every presumption in favor of a father's desire, circumstances permitting, that his children should take his estate in the form in which he leaves it invested. But as there may be difficulties attending satisfactory division in specie among numerous heirs, testators often provide for melting the estate into money for absolute equality in division. That is the extent of the testator's wish. His provision for division in that manner furnishes no foundation for the belief that he thereby intended to postpone beyond his death the vesting in his children of the right to his estate.

In the seventh clause the testator says that "in case of the death of any of my said children, I order and direct that the part of him or her so dying be paid to his or her lawful issue." Here, the death of the devisee, an absolutely certain event, not being by the testator associated with any circumstance or other event, the law refers it to the time of his own death. It is a well-established rule that where there is a devise to A, and in case of his death to B, if A survives the testator, he takes absolutely: *Lowfield v. Stoneham*, 2 Strange, 1261; *Hinckley v. Simmons*, 4 Ves. 160. And this is the language of the testator in the seventh paragraph.

The presumptions, from the frame of this will, that the testator preferred children to grandchildren, the vesting of his estate in his children at his death, rather than upon an event of uncertain time thereafter, and the express provision for such vesting contained in the seventh clause, — are together too weighty to permit any inference to the contrary to be drawn from the words "shall have received," in the ninth clause. In the light of all else in the will, these are to be interpreted as meaning "shall have become entitled to receive by surviving me." In common understanding, also, the devisee of an estate in fee-simple absolute "receives" it at the moment of the testator's death, although the enjoyment is postponed until the demands of creditors shall be satisfied. He can convey and give title; he can devise.

The superior court is advised that the devises by the seventh and ninth clauses vested in right in the children of the testator at his death.

WILLS, CONSTRUCTION OF — WHEN LEGACIES ARE VESTED, AND WHEN CONTINGENT: Extended note to *Goebel v. Wolf*, 10 Am. St. Rep. 471-478; *Coggin's Appeal*, 124 Pa. St. 10; 10 Am. St. Rep. 565, and note; *Loring v. Carnes*, 148 Mass. 223; *Crosby v. Crosby*, 64 N. H. 77; *Rhodes v. Shaw*, 43 N. J. Eq. 430; *Williams v. Williams*, 73 Cal. 99. The rule that controls all others in the interpretation of wills is, that the intention of the testator, which must be gathered from the entire will, must govern: *Jenks v. Jackson*, 127 Ill. 341; *Sutherland v. Sydnor*, 84 Va. 880; *East v. Garrett*, 84 Id. 523; *Jasper v. Jasper*, 17 Or. 590; *Elliot v. Elliot*, 117 Ind. 380; 10 Am. St. Rep. 54, and note 59.

WILLS WHEN TAKE EFFECT. — The English rule is, that as to realty, a will speaks at its date, but as to personalty, at the date of the testator's death: *Raines v. Barker*, 13 Gratt. 128; 67 Am. Dec. 762.

STATE v. SCHEELE.

[57 CONNECTICUT, 307.]

CRIMINAL LAW — HOMICIDE IN RESISTING ILLEGAL ARREST. — A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him; and if resistance by lawful means results in the death of the assailant, it is excusable homicide; if by unlawful means, but without malice, it is manslaughter; if by unlawful means, prompted by hate and malice, and death in cool blood is intended, it is murder in the first degree.

CRIMINAL LAW — MURDER — INSTRUCTION TO JURY. — Where, upon a trial for murder, there is evidence tending to show that the accused was actuated by malice, as well as by motives of self-protection, against an apprehended assault for the purpose of an illegal arrest, the court may properly submit to the jury the whole question of motive, whether of defense or of malice.

CRIMINAL LAW — MURDER — PROPER SUBMISSION OF CASE TO JURY. — Upon a trial for murder in shooting and killing an officer, who had a warrant for the prisoner's arrest, and was approaching his house to execute it, the jury were instructed that "a specific, willful, deliberate intent to kill would constitute express malice aforethought," and the charge continued as follows: "If you find that the deceased was approaching the house for the purpose of breaking in to arrest the accused illegally, and the accused, under the circumstances, had reason to believe, and did believe, that the deceased was about to execute such purpose, he had a right to make all reasonable resistance; and if you find that, without saying a word to the deceased, and while he was at some distance from the house, and had made no actual assault upon it, the accused shot at and killed him, such act would not be a reasonable exercise of his right to resist, and such killing, if done with express malice, as explained, would be murder in the first degree; but otherwise, if done without express malice. It is for you to say, from all the evidence, what were the facts, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice; and you are to judge this man as the circumstances appeared to him at the time." In a later part of the charge, the jury were instructed, in substance, that if the

killing was done on account of provocation, in a sudden heat of passion caused thereby, and not of express malice, it would reduce the crime to manslaughter; but if the killing was the result of deliberate, willful, and premeditated intent, and not the result of provocation, it would be murder. In such case, taking the whole charge together, the jury could not fail to understand that if the killing was done in defense of house, person, or liberty from the apprehended assault, and without other motive, but under such circumstances as to be an unreasonable exercise of the right of defense, the prisoner would be guilty of manslaughter only, and the case was properly submitted to the jury.

D. B. Lockwood and H. J. Curtis, for the appellant.

S. Fessenden, state's attorney, and *J. C. Chamberlain*, for the state.

CARPENTER, J. The facts of this case are stated in the finding as follows:—

Upon the trial of this cause to the jury, it was shown by uncontradicted evidence that on the twenty-fifth day of January, 1888, at New Canaan, in Fairfield County, Scheele, the prisoner, shot and killed one Louis Drucker, of said New Canaan; that at the time of the killing Drucker had in his possession a warrant for the arrest of Scheele, for the crime of violation of the laws relating to the sale of spirituous and intoxicating liquors; that Scheele was in his own house, with the doors and windows fastened against the entrance of Drucker, and that Drucker, having a short time before tried to enter the house, was, with his assistants, on the land of the prisoner, and in the act of approaching the house, for the purpose of executing the warrant.

The state claimed, and offered evidence to prove, that at the time Drucker was a lawfully elected and qualified constable of New Canaan; that on said day he went to the house of Scheele for the purpose of lawfully arresting him upon the complaint which he then had in his hand for service; that he tried the doors of the house, and found them locked, and that some words passed between Drucker and the prisoner; that Drucker then went to the village of New Canaan for assistance, and returned to the house in about fifteen minutes, and on approaching within nineteen feet of the house, the prisoner, without warning Drucker, or saying a word as to his intention, fired a gun loaded with shot at Drucker, killing him instantly.

The state further claimed, and offered evidence to prove, that, prior to the killing, the prisoner had a quarrel with

Drucker, and had a bitter feeling towards him, and had made threats against him, and planned to murder him; and in proof thereof, among other witnesses, offered as a witness Charles Seacord, who testified that on the twenty-fifth day of December, 1887, while in his custody under arrest, the prisoner asked him where the "damned Jew" was, meaning Drucker, saying, "I'll fix him so he will stay fixed, and he will not be dogging me around any more"; also Charles Griebel, who testified that, two weeks before the shooting, Scheele said to him that "Drucker, Hawley, and others were troubling him, and that if he could get rid of these men he would be willing to die for it"; also Frank F. Sandford, who testified that he was at Scheele's house on Christmas day, 1887, and while there, and while Drucker was searching his house on a search-warrant, Scheele wanted to go to his room, saying that he "had something there, which if he had it, he would rip him [Drucker] up," and that he also said, "what they want in New Canaan was three men like them in Chicago"; and also Ezra S. Hall, who testified that after the killing, when he told Scheele that he had killed Drucker, he replied, "I don't care a damn; I am glad of it."

The state also, for the purpose of showing deliberation and premeditation, offered as a witness Mary Banzhalf, who testified that, five minutes after Drucker had left the house the first time, Scheele began to nail up the windows of his house, and that he broke pieces of glass out of one of the windows in the second story, and that she saw a hand pull out the broken glass; and the state also offered evidence that Scheele fired the gun out of the window so broken.

The defense claimed, and offered the testimony of the prisoner to prove, that Drucker intended, if necessary, to enter the house by force, and to take him, dead or alive, and that he believed that he so intended to do. The defense also claimed, from the testimony of certain witnesses for the state, that Drucker, when approaching Scheele's house the second time, intended and was about to break into the house unlawfully, and arrest Scheele in an unlawful manner, and that Scheele so believed, and was justified in so believing. The state denied this claim, and from the whole evidence claimed that Scheele neither believed, nor was justified in believing, that Drucker intended or was about to break into the house unlawfully, or to make the arrest unlawfully.

The defense also claimed, and offered evidence to prove,

that the prisoner was of unsound mind at the time of the killing; that immediately after killing Drucker he attempted to kill himself, by firing four small bullets from a pocket-pistol, one into his head and three into his body; and by such action, and his conduct before and at the time of the shooting, claimed to have proved that he was incapable of forming a deliberate intent to kill; at least, incapable of forming an intent to commit the crime of murder in the first degree. The state claimed, and offered evidence to prove, that the prisoner was of sound mind at the time of the commission of the crime, and that he was capable of forming a deliberate and premeditated intent to take the life of Drucker, and also that Drucker had no intention to enter the house by force, or to make the arrest of the prisoner in any other than a lawful manner, and that there was nothing in the conduct or language of Drucker to indicate any such intention, or to induce such belief on the part of Scheele, and that Scheele did not in fact believe it.

Upon the evidence so offered the state claimed that Scheele willfully, deliberately, and premeditatedly, and of his malice aforethought, killed Drucker, and thereby committed the crime of murder in the first degree.

The prisoner was convicted of murder in the first degree, and appealed to this court. The reasons of appeal relate to the charge to the jury and the refusal of the court to charge as requested.

The part of the charge complained of in the second reason of appeal is as follows: "If you find that the deceased entered upon said land and was approaching said house for the purpose of breaking into the house to arrest the accused in an illegal manner, and the accused, under the circumstances, had reason to believe, and did believe, that the deceased was about to carry such purpose into immediate execution by an assault upon the house, the accused had the right to make all reasonable resistance to prevent the deceased from executing said purpose; and if you find that, under the circumstances, the accused, without saying a word to the deceased by way of warning or otherwise, and while the deceased was at some considerable distance from the house, and had made no actual assault upon it, as claimed by the state, shot at and killed him, such an act would not be a reasonable exercise of the right of the accused to resist under such circumstances, and such killing, if done with express malice aforethought, as I

have explained it, would be murder in the first degree; but if done without such express malice aforethought, but with implied malice, would be murder in the second degree. It is for you to say, as a question of fact, from all the evidence in the case, what were the facts and circumstances under which the killing was done, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice; and you are to judge this man as the circumstances appeared to him at the time."

Counsel for the defense claim, "that, on the facts assumed by the court to be proved, the instructions given were not correct and adapted to the issue, or sufficient for the guidance of the jury in the case before them; for while the court charges the jury that the action of the prisoner in firing upon the deceased nineteen feet from the house, and without warning, is an unreasonable exercise of his right of defense, the court fails to say that if the shooting was done in defense of house, person, or liberty from an unlawful assault, or one about to be made, and from no other motive, the prisoner would be guilty of manslaughter."

This claim assumes what the record will not warrant, that the evidence was such as to require a charge upon the theory that the prisoner's sole motive was to defend his house and person by repelling an attack which he supposed was about to be made upon them by the deceased; for there was evidence, and pretty strong evidence, that the prisoner was actuated by express malice. If so, there was also the motive of revenge or the gratification of malice. The criticism is based upon the theory that it was the duty of the court to ignore all evidence tending to prove such a motive, and submit this part of the case to the jury on the motive of defense alone. The case did not call for that; therefore we think the court properly submitted to them the whole question of motive, whether of defense or of malice. If there was express malice, there were necessarily motives apart from those of self-protection. It is conceded that motives of defense, in order to avail the prisoner, must have been the only ones; for counsel certainly do not go so far as to claim that, if there was occasion to defend person or property, or both, the prisoner might avail himself of that occasion to deliberately and of his express malice take the life of the assailant for other reasons, and incur no greater risk than the penalty for manslaughter.

"And such killing, if done with express malice aforethought,

as I have explained it, would be murder in the first degree." This sentence is objected to as telling the jury, in effect, that the shooting not being justifiable, the prisoner is guilty of murder in the first degree. We do not think that that expresses fairly the meaning of the charge, the whole of which is to be taken together in determining its meaning. The court very fully and fairly explained malice to the jury, and the distinction between express and implied malice, and also an unlawful killing without malice; and the jury was distinctly told repeatedly that express malice was essential to the crime of murder in the first degree. We cannot interpret the charge as giving the jury to understand that an intent to take life unlawfully was necessarily equivalent to express malice, or that any form of killing without malice would be murder. It seems impossible that the jury could have received the impression that the killing, if without malice, could be murder in the first degree. The jury could not fail to understand that if the shooting was done in defense of house, person, or liberty from the apprehended assault, and without other motives, consequently without malice, but under such circumstances as to be an unreasonable exercise of the right of defense, the prisoner would be guilty of manslaughter only.

But if it be conceded that the defense was entitled to a charge which would or might take from the jury the question of malice, and require them to pass upon the case upon the theory that malice was wholly wanting, then we think that the jury were told, in substance, all that the defense now claims that they should have been told, in the court's response to the defendant's requests. But aside from that, the jury were not required to take that view of the case, or to consider it in that aspect; for they found, and must have found, that the killing was willful, deliberate, and premeditated, or as the court expressed it, "of his express malice, and out of the hatred of his heart."

It is also claimed that the court erred in stating as a matter of law that, under the circumstances of the case there outlined, the killing would be an unreasonable exercise of the right of defense. But counsel in their requests and in their arguments admit that it was an unreasonable exercise of the right of defense; for they claim that the offense was manslaughter; whereas, if it had been a reasonable exercise of the right, the act was justifiable, and not a crime at all. Moreover, the opinion expressed by the court was based on

the assumption that the facts as claimed by the state were proved, and on that assumption was obviously correct. Again, the court submitted it to the jury "to say, from all the evidence in the case, what were the facts and circumstances under which the killing was done, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice."

The third reason of appeal arises upon the court's response to the prisoner's seventeenth request to charge the jury, which request and answer are as follows: "If the jury find that the deceased was not in fact attempting to make a forcible and unlawful entry into the dwelling-house of the prisoner, yet if they are of opinion that the deceased and his party were on the point of unlawfully breaking in, or likely to do so, and under such circumstances as to raise a reasonable belief in the prisoner's mind that such was their intent, and that imminent danger of great bodily harm was threatened him, and under this belief he fired the shot, such circumstances are a sufficient provocation to make the killing manslaughter, and not murder." To this the judge responded: "I charge that, gentlemen, with this limitation, if this killing, under the circumstances here claimed, was done on account of the provocation, in a sudden heat of passion caused by such provocation, and not of his express malice, and out of the hatred of his heart, that is the law. It would, under such circumstances, reduce the crime to manslaughter. But if, on the other hand, under the circumstances stated in this request, he had hatred in his heart toward this man, and intended to kill him, and the killing was the result of deliberate, willful, and premeditated intent, and not the result of this provocation, it would not reduce the crime to manslaughter at all, but in such case would be murder."

It will be observed that one of the assumed facts on which this request is based is, that there was a reasonable belief in the prisoner's mind that he was in "imminent danger of great bodily harm." That claim need not be considered in this connection, because that was the subject of a distinct request, and the court charged as requested. We quote the request and charge.

"If the jury find that the prisoner was occupying a dwelling-house, and resisting an unlawful attempt to enter his house by force, and fired the shot under such circumstances as would produce in his mind a reasonable belief of imminent

danger of great bodily harm or death, the killing of his assailant is not criminal, but excusable." To which the judge responded: "If you find such a state of facts to exist in this case, gentlemen, that is the law. If you find that this man, under the circumstances, within the language of this request, was occupying his dwelling-house, and resisting an unlawful attempt to enter the house by force, and that he fired the shot under such circumstances as would produce in his mind, judging him by the circumstances as they appeared to him, a reasonable belief of imminent danger of great bodily harm or death, the killing of his assailant is not criminal, but excusable."

We return now to the seventeenth request. There can be no objection to the court's response to that. The jury were properly required to find whether the homicide was the result of passion and excitement caused by the provocation, or was the result "of his express malice, and out of the hatred of his heart." Of course the jury found the latter to be true

It is not a fair interpretation of the charge to say that the jury were told that if they found "that this man was defending his house, person, or liberty, and acted with any deliberation whatever, and was not in a sudden heat of passion, then they must find him guilty of murder." There is another side to it. This particular portion of the charge — and in that it agrees with the tenor of the whole charge — instructed the jury to inquire whether "the killing was the result of deliberate, willful, and premeditated intent, and not the result of this provocation"; and that if it was, "it would not reduce the crime to manslaughter at all, but in such case would be murder."

The eighteenth request, and the response thereto, were as follows: "If the jury find that the deceased was not in fact attempting to make a forcible and unlawful entry into the dwelling-house of the prisoner, yet if they believe that the deceased and his party were on the point of breaking in, or likely to do so, and under such circumstances as to raise a reasonable belief in the prisoner's mind that such was their intent, and that he would be powerless to prevent their entrance by the exercise of a less degree of force than that applied, or such a degree of force less promptly applied, such circumstances are a sufficient provocation to make the killing manslaughter, and not murder." The instruction given was as follows: "Gentlemen, if you find the facts as here claimed,

the law is so; with the limitation stated under the other request, that, under all the circumstances, the shooting was the result of a sudden heat of passion arising from this provocation; that the prisoner, under all the circumstances, had reason to be provoked; that as he looked at it, as the circumstances appeared to him, he was suddenly carried beyond a control of his will by an excess of passion, caused by such provocation, and that the shooting was not the result of malice."

Here the defense called attention to the facts and circumstances tending to prove a provocation, and on which the request was based, and asked the court to consider them without regard to the evidence tending to prove malice, and to say that such circumstances are a sufficient provocation to make the killing manslaughter, and not murder. It was not the duty of the court so to charge, without qualification or limitation, and such a charge would not have been adapted to the facts and claims of the parties. Here, too, the jury were properly told, in substance, to inquire whether the killing was with or without malice.

The prisoner's counsel, under the fourth head of their brief, enlarge upon the objections raised in the second and third heads. Here they admit that the law as given by the court may be a sufficiently correct general statement, but claim that it fails to be correct when applied to a case like this, where a homicide is claimed to have been committed in defense of house, liberty, or person.

The objections made by the defense, and the whole course of the argument, seem to imply a claim that if the element of defense of property or person was involved in the act, the offense, as matter of law, could not be greater than manslaughter, no matter how strong the evidence might be of express malice. That cannot be the law. It was for the jury to say whether there was malice and consequent murder.

In support of their claim, counsel cite *Commonwealth v. Carey*, 12 Cush. 246. In that case, the prisoner had broken into the ticket-office of a railroad company, but there was no evidence that he had stolen anything. The deceased, who was a constable, caught him in the ticket-office, and arrested him. The prisoner attempted to escape, and was pursued by the deceased. The prisoner turned around, with a pistol in his hand, and told the deceased to go back or he would shoot him. The deceased stopped, but did not go back, and the prisoner shot him. On the sole ground that the deceased had

no right to arrest him without a warrant, the crime he had committed not being a felony, the court held that the homicide was manslaughter, and not murder. Shaw, C. J., said: "The court were of opinion, and proposed to instruct the jury, that if a prisoner is unlawfully arrested, and if, in resisting the arrest, or attempting to escape, he takes the life of the person so arresting him, although the act is not justifiable, and amounts in law to a criminal homicide, yet it is not homicide with malice aforethought, which is necessary to constitute murder, but it will, in contemplation of law, be manslaughter. This was a principle somewhat technical, but yet well established by law; that although in many cases, and even in the present case, if the evidence already offered should remain uncontroverted, the act might be done under such circumstances of deliberate cruelty as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder, yet the prisoner must be tried by the rules of law, and not by the aggravation of the offense as tried and tested by another and different standard."

Thus the question whether it was murder or manslaughter depended upon the common-law distinction between felony and minor offenses,—a distinction without much significance at the present day, and one with which, presumptively, both the prisoner and his victim were not familiar, instead of upon the facts attending the homicide and the *animus* of the prisoner. Murder was then (in 1853) but one offense, having been divided into the first and second degrees five years later. As it was either a capital offense or manslaughter, we can appreciate the willingness and even the desire of the court to regard it as the lesser offense. But aside from this, there was no evidence of previous ill-will or animosity toward the deceased; and the prisoner gave him warning, thus indicating a desire to escape without taking life; while in this case there was evidence of express malice, indicating a desire to take life, and the act was perpetrated without caution or warning. On the whole, we can hardly regard that case as a controlling authority.

In *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200, the court treats mainly of justifiable homicide in defense of one's dwelling-house. The question of manslaughter, in such cases, is indeed spoken of; but we do not find in that case any authority for the proposition that if an officer is about to enter a house unlawfully, in the daytime, for the purpose of arresting

the occupant for a misdemeanor, and the occupant, out of the hatred of his heart, and of express malice, kills the officer, the crime, as matter of law, is manslaughter only. The law of self-defense, or the defense of one's domicile, does not require the giving to evil-minded persons an opportunity to take the life of another on such easy terms.

In *Brooks v. Commonwealth*, 61 Pa. St. 352, 100 Am. Dec. 645, a theft was committed in a house. Soon after, the owner and his brother pursued the thieves, and overtook them. In attempting to arrest them, the brother was killed. The prisoners were indicted for murder. On the trial, the court was asked to charge that the pursuers, not being public officers, had no authority to arrest, the arrest was illegal, and the killing was not murder, but manslaughter. The court refused so to charge. It was held not to be error, as so to charge would have taken the whole case from the jury. The *syllabus* says: "If the arrest had been illegal, it was still for the jury to determine whether the killing was without malice, and arose from a sudden heat upon the arrest." In the course of the opinion the court says: "An innocent man is unconscious of guilt, and may stand on his own defense. When assailed under a pretense which is false, his natural passion rises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If in the frenzy of passion he loses his self-control, and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation; he knows his violation of law, and that duty demands his capture. Then passion is wickedness, and resistance is crime. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offense, and makes it stand in defense of personal liberty. On the contrary, fear settles upon his heart, and when he uplifts his hand, the act is prompted by wicked hate and the fear of punishment. . . . A sense of guilt cannot arouse honest indignation in the breast, and therefore cannot extenuate a cruel and willful murder to manslaughter."

That case, in some of its features, resembles this; and especially in respect to the all-important fact that there is evidence of express malice, the existence of which, under the charge of the court, has been found by the jury. Of course

the observations in that case have no application to a case where an innocent man is being lawfully arrested. Nor do they apply in full force to the case at bar; but they are applicable to some extent. The officer was attempting to arrest the prisoner for a violation of the law relating to the sale of spirituous liquors. Whether guilty or innocent, it was his duty as a law-abiding citizen to submit to the arrest. Men generally, uninfluenced by passion, would have done so. Had he done so, he would have been discharged as innocent, or have received a comparatively light punishment for his offense, and no serious consequences would have resulted. His house would have received no harm, and his life and the life of the officer would have been saved. True, he was not bound to submit to an illegal arrest. He had a strict legal right to fortify himself in his castle, and to resist an attack upon it by all lawful means. If resistance by lawful means results in death, it is excusable homicide; if by unlawful means, and without malice, it is manslaughter; if by unlawful means, prompted by hate and malice, and death in cool blood is intended, it is murder in the first degree. No man who is being wronged may take that occasion to deliberately murder the wrong-doer.

In *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601, the prisoner was being arrested for violating a by-law of the city of Chicago, on a warrant signed in blank by a magistrate, and subsequently filled out by a sergeant of police, who gave it to a policeman to serve. The officer and the deceased attempted to arrest the prisoner, when the homicide occurred. It was held that the warrant was void, and the crime manslaughter only. The court says: "His name was inserted in the warrant by the sergeant of police, after it had been delivered to him by the magistrate, without authority. These facts, if found by the jury, should determine the character of the homicide to be manslaughter, unless the proof showed express malice towards the deceased."

The existence of proof of express malice is what distinguishes this case from that.

The same case was subsequently before the court (*Rafferty v. People*, 72 Ill. 37), and a portion of the *syllabus* reads as follows: —

"4. If an officer be resisted and killed by one whom he is illegally attempting to arrest, and it appears that the party who does the killing was actuated by previous or express

malice in so doing, such killing is murder, notwithstanding the illegality of the attempted arrest."

"7. When a party procures a weapon for the express purpose of resisting an arrest, whether legal or illegal, by a particular officer, or by one of a particular class of officers, and such officer attempts to arrest him, and before any violence is done or offered to him, he kills such officer with the weapon thus provided, the jury will be justified in finding that he was actuated by previous or express malice, and the killing is murder, notwithstanding the attempted arrest was illegal."

On the trial then under review were two important questions of fact: 1. Was the deceased participating in the attempted illegal arrest? 2. Was the prisoner actuated by express malice? The court, in its opinion, says: "But there is another view of the evidence which would entirely override the questions of illegal arrest or O'Meara's participation in it, and that was the evidence of previous or express malice. Only three days previously the prisoner declared, in substance, that no Bridgeport policeman should arrest him while he had a pistol. It appears that, although finding him in the saloon was a matter of pure accident, he was already prepared with the very weapon alluded to in his threat. These officers were Bridgeport policemen, and it appears that he did not use it upon the deceased merely because he was preventing his egress from the saloon, but when he had shot him through the breast, then, without offering to go out of the door, he instantly turned around and fired two shots at Scanlon, who was back of him, and had no agency in preventing egress from the room, either by personal violence, or constructively by guarding the door."

In the present case the prisoner testified that he believed that Drucker intended, if necessary, to enter the house by force, and that he intended to take the prisoner "dead or alive," and that he believed that he intended so to do. Whether there was other evidence tending to prove that the officer intended great bodily harm, we know not; but, as we have seen, the question whether the prisoner was in imminent danger of great bodily harm or death, or that he believed that he was, was submitted to the jury, and the verdict was an emphatic negative answer. The prisoner therefore cannot be regarded as defending his life or himself against great bodily harm, but simply as defending his house against an unlawful entry by parties whom he knew, in the daytime, for the purpose of exe-

cuting a lawful warrant, and his person against an unlawful arrest by reason of such unlawful entry.

If, in making such defense, the prisoner had not intended to kill the deceased, but had, by an unreasonable defense, unintentionally killed him, the crime would have been manslaughter. If the prisoner had warned him of his intention, had commanded him to desist, had given him a reasonable opportunity to desist before shooting, the offense could hardly have been regarded as greater than manslaughter. Now, take the case as it was. There was evidence tending to prove that, prior to the killing, the prisoner had a quarrel with Drucker, and had a bitter feeling towards him, had made threats against him, and had planned to murder him. He asked one witness where the "damned Jew" was, meaning Drucker, saying, "I'll fix him so he will stay fixed, and he will not be dogging me around any more." About two weeks before the shooting, he said to another witness, that "Drucker, Hawley, and others were troubling him, and that if he could get rid of these men he would be willing to die for it." On one occasion, while Drucker was searching his house on a search-warrant, he wanted to go to his room, saying he "had something there, which if he had it, he would rip him up." He also said: "What they want in New Canaan was three men like them in Chicago." Another witness testified that, five minutes after Drucker left the house the first time, the prisoner began to nail up the windows of his house, and that he broke pieces of glass out of one of the windows in the second story. The state also claimed to have proved that he fired the gun from the window so broken.

Now, suppose that the jury believed this evidence, as they must have done, is it possible that the offense in law, by reason of the defense of his house and of his person from such unlawful arrest, is manslaughter only? Is that the protection which the law throws around its officers? May any one who has murder in his heart, and desires to kill an officer, and who is about to be arrested for a misdemeanor, fortify himself in his dwelling-house, and on the approach of the officer, without notice or warning, shoot him, "of his express malice, and out of the hatred of his heart"?

A majority of the court think that the case was properly submitted to the jury, and therefore find no error.

PARDNER, J., dissented, upon the ground of error in the charge of the court to the jury. After stating the charge, as set out in the prevailing opinion

and asserting the right of a person in his own house to resist unlawful arrest, he thus proceeds: "The court had previously instructed the jury that 'to constitute murder in the first degree, there must have been in the mind of the accused, at the time of the homicide, a deliberate, specific intent to kill, as this is an essential element of this crime. Such a specific, willful, deliberate intent to kill would constitute express malice aforethought.' In effect, therefore, the jury were instructed that if they should find this killing to have been the result of unnecessary force, or to have been unnecessarily soon, and therefore unlawful, it would be murder in the first degree, if it was done in coolness, and with premeditation. But, as a matter of law, it is possible for a man to be very cool, deliberate, and determined in defending his house from an unlawful entry by force for the purpose of making an unlawful arrest of himself, even to the killing of the assailant, by force found to have been unnecessary in degree and time, and therefore unlawful, and yet not to be guilty of murder in the first degree. If the premeditation and intent are the result of previous hatred and malice, and are in any degree based upon revenge for past injuries, and not wholly upon protection from present danger, and if the present danger is used only as an opportunity for such revenge, the killing is murder in the first degree. The jury are to determine, in all cases, as to the foundation of the premeditation and intent; also, under instructions by the court as to the rule of law, to determine the fact as to the reasonableness or unreasonableness of the force used in repulsion. It cannot be said, as a matter of law, that, under any and all circumstances, the killing of such assailant, even without warning, and when twenty feet distant from the house in his approach, was unreasonable, and therefore unlawful, and therefore murder or manslaughter in some degree. It is for the jury to say, under instructions as to the rule of law, if a warning was necessary, and if the killing at twenty feet distant was unnecessary." In support of the view taken, he cited the cases examined in the prevailing opinion, and also the following: *Commonwealth v. Drew*, 4 Mass. 395; *Pond v. People*, 8 Mich. 150. Beardsley, J., concurred in the dissenting opinion.

ARREST OR ATTEMPTED ARREST OF INNOCENT PERSONS, OR OF PERSONS WITHOUT WARRANTS. — Where a private citizen seeks to arrest an innocent party, and is killed by him, the killing is merely manslaughter: *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645; and so a homicide committed in resisting an illegal arrest is *prima facie* merely manslaughter: *Roberts v. State*, 14 Mo. 138; 55 Am. Dec. 97; compare *Eanes v. State*, 6 Humph. 53; 44 Am. Dec. 289, and note; *Hawkins v. Commonwealth*, 14 B. Mon. 395; 61 Am. Dec. 147; but where an officer of a municipality has the power to arrest without a warrant for violations of the city ordinances committed in his presence, killing him while attempting to make an arrest under such circumstances, when he was using no unnecessary violence, could not be justified upon the plea of self-defense: *State v. Fuller*, 96 Mo. 165. Where an officer having authority to make an arrest is killed while he is attempting to do so, such killing is murder; but where the arrest was illegal, the crime is reduced to manslaughter: *Rafferty v. People*, 69 Ill. 111; 18 Am. Rep. 601.

HOMICIDE COMMITTED DEFENDING ONE'S PROPERTY. — While one cannot commit homicide in protecting his property against trespassers, yet he need not submit passively, without remonstrance or resistance: *Bush v. People*, 10 Col. 566; compare *Estep v. Commonwealth*, 86 Ky. 39; 9 Am. St. Rep. 260, and note; *Stanley v. Commonwealth*, 86 Ky. 440; 9 Am. St. Rep. 305, and note.

MURDER, STATUTORY DEGREES OF: Extended note to *Whitford v. Commonwealth*, 18 Am. Dec. 774-787. Mere words never reduce a homicide from murder to manslaughter: *Lane v. State*, 85 Ala. 11; compare *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781, and note. "Premeditation is a necessary ingredient of murder in the first degree": *Wiggins v. State*, 23 Fla. 180; *Dolan v. State*, 22 Id. 664.

STATE v. SETTER.

[IN CONNECTICUT, 45L.]

CRIMINAL LAW. — CONSPIRACY IS THE AGREEING OR CONFEDERATING together by two or more persons to commit some crime or misdemeanor. Such confederation or agreement is itself the offense, and no overt act is necessary.

MURDER — CRIMINAL LAW. — CRIME OF CONSPIRING TO STEAL IS NOT MERGED in the crime of the actual theft committed, and may be punished as a separate offense.

J. H. Webb, for the appellant.

G. M. Gunn, for the state.

ANDREWS, C. J. The appellant, together with one Mary Reese, was informed against in the criminal side of the court of common pleas in New Haven County for the offense of conspiracy. The information charged "that on or about the third day of April, 1889, at the city of New Haven, Mary Reese and Jennie Setter, both transient persons temporarily residing in said city, with force and arms did then and there wickedly, designing and intending to commit the crime of theft therein, fraudulently, maliciously, and unlawfully, conspire, combine, confederate, and agree together between themselves to enter, and did enter, the store of F. M. Brown and Company, of said city of New Haven, and there situate, in which store were deposited goods, wares, and merchandise, the proper estate of the said F. M. Brown and Company, with intent then and there, in the said store aforesaid, to commit the crime of theft," etc. In brief, the information charges that the persons therein named conspired to steal generally in the store of F. M. Brown and Company,—possibly all the goods in that store; at any rate, so many of the goods as they might be able to lay their hands on.

The appellant had a separate trial, was convicted and sentenced, and has appealed to this court. Upon her trial, the state, for the purpose of proving the combination between herself and her companion, and for the purpose of proving the

intent alleged, offered evidence which tended to show that the accused actually stole twelve neckties of the value of fifty cents each, in the store of F. M. Brown and Company. There was no evidence of any other stealing in the store.

The counsel for the appellant asked the court to instruct the jury as follows: "Under the laws of this state, a conspiracy to commit the crime of theft is a misdemeanor, while the crime of theft itself is a felony, and that the law is so that if the conspiracy is consummated and the theft is actually committed, then the conspiracy is merged in the theft, and the accused cannot lawfully be convicted of conspiracy; that where the felony is in fact committed, a conspiracy to commit such felony cannot be indicted and punished as a distinct offense. If you find, therefore, from the evidence, that the crime which it is alleged the accused conspired to commit, to wit, the theft of the goods, the property of F. M. Brown and Company, was in fact consummated, and the theft was actually committed, your verdict must be that the accused is not guilty of the offense for which she is now on trial." The court did not so charge the jury.

The only question argued before the court is, whether or not the crime of conspiring to steal, as set forth in the information, was merged in the crime of the actual theft of which evidence appeared on the trial. In the reasons of appeal the question is stated thus: The court erred while stating to the jury that "if the overt act has been carried into execution, and the offense has been punished once, it cannot be punished a second time"; and in not also instructing the jury, as requested by the defendant, "that when the felony is in fact committed, a conspiracy to commit such felony cannot be indicted and punished as a separate offense."

The broad claim of the appellant is, that if the crime to commit which the conspiracy is formed is actually committed, then the conspiracy is merged in the committed crime, and ceases itself to be a crime at all. It is admitted, however, that if the contemplated crime be of that class of crimes called misdemeanors, the conspiracy is not merged; and that in a case where there is a conspiracy to commit a misdemeanor, and the misdemeanor is actually committed, the offender may be punished for the conspiracy and for the misdemeanor also. But it is insisted that if the contemplated crime is of that class called felonies, then if the felony is actually committed, the conspiracy is merged, and no longer exists as a separate

and distinct offense. Put in its simplest form, the argument is this: Conspiracy is a misdemeanor; theft is a felony; a misdemeanor is a less crime than a felony, and so in a case where there is a conspiracy to commit a theft, that crime being a felony, and the theft is actually committed, the less offense is merged in the greater.

Stated in this way, the argument seems quite imposing. The force of the argument comes largely from the use of the word "felony," and in giving to it the same meaning it had in the common law. Originally, the term imported all those offenses of which the feudal consequence was the forfeiture of all the offender's land and goods; to which, in later times, capital or other punishment was sometimes added. In American law the word has no clearly defined meaning, except as it is given a meaning by some statute. In Massachusetts there is a statute which enacts that any crime punishable by death or imprisonment in the state prison is a felony, and that no other crime shall be so considered. There is a similar statute in New York and in some of the other states. In Swift's System, published in the year 1796 (vol. 2, pp. 884, 385), the learned author says: "Felony, according to the English law, signifies some crime the punishment of which is a forfeiture of estate; but in common consideration it is a capital crime. In this state, in the title of two statutes, the word 'felonies' is used. . . . The word is never introduced into the body of any statute, and is applied to the description of crimes not capital, and for which there is no forfeiture of estate. It is therefore apparent that this word cannot be used in the same sense and for the same crimes as in England; nor does it with precision comprehend any class or description of crimes. A word of such uncertain meaning ought to be banished from a code of laws, for nothing produces greater confusion and perplexity than the use of terms to which no precise and clear idea can be affixed. . . . The word 'feloniously' is used in indictments for all capital crimes, and for many not capital, as for theft; but as 'felonious,' in an indictment, can mean nothing more than 'criminal,' and does not designate the nature or the class of the crime, it may be deemed unnecessary and immaterial, and ought to be exploded by our courts."

Since the time when Judge Swift wrote, the word "felony" has disappeared from the statute, although the word "feloniously" is still used in indictments and informations. And

while it is still true that this word does not with precision comprehend any class or description of crimes in Connecticut law, it may be pretty safely asserted that petty larceny is not a felony in this state.

The earliest American case cited by the counsel for the appellant in support of their claim of merger is *Commonwealth v. Kingsbury*, 5 Mass. 106. In that case the court say: "We have considered this case, and are of opinion that the misdemeanor is merged. Had the conspiracy not been effected, it might have been punished as a distinct offense; but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony when committed pursuant to it. The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor, but if the intent be carried into execution, the offender can be punished but for one offense."

This case is the authority given for the *dictum* in 2 Swift's Digest, page 359, and it is the leading, if not the only, authority for the decision in every one of the cases cited in the appellant's brief. It is noticeable that Judge Swift, while giving the case above named as authority for the law that a conspiracy merges in a felony, in almost the very next sentence on the same page repudiates that case, so far as it says that a conspiracy will merge in a misdemeanor, although the reasons given by the judge who gave the opinion in that case for the merger in a misdemeanor are the same as for a felony. In this respect all the cases cited follow Judge Swift. They reject the reasoning in the Massachusetts case when it applies to a misdemeanor, and adopt it when it applies to a felony.

Mr. Bishop, in his treatise on the criminal law (7th ed., sec. 814), after discussing the rule that a conspiracy merges in a felony, remarks: "The doctrine, the reader perceives, is contrary to just principle; it has been rejected in England, and though there may be states in which it is binding on the courts, it is not to be deemed the general American law." Professor Wheaton (Criminal Law, 8th ed., sec. 1344) says: "The technical rule that a misdemeanor always sinks in the felony when the two meet has in some instances been recognized in this country, though without good reason. . . . And in several of our courts a disposition has been exhibited to reject the doctrine in all cases: See cases cited below.

In England, the doctrine that a conspiracy to commit a fel-

ony is merged in the felony itself has been expressly rejected. Lord Denman, in rendering the judgment of the court of queen's bench in *Regina v. Button*, 11 Q. B. 929, said: "A misdemeanor which is a part of a felony may be prosecuted as a misdemeanor, though the felony has been completed." The case was one where the defendants were charged with a conspiracy to commit a theft, and the evidence tended to show that the theft had been actually committed. *Regina v. Neale*, 1 Den. C. C. 36, is to the same effect.

If a conspiracy to commit a felony is regarded as an attempt to commit that felony, then the authorities very largely preponderate to the effect that there is no merger: *State v. Shepard*, 7 Conn. 54; *Commonwealth v. Walker*, 108 Mass. 309; *Commonwealth v. Dean*, 109 Id. 349; *Barnett v. People*, 54 Ill. 325; *Bonsall v. State*, 35 Ind. 460; *People v. Bristol*, 23 Mich. 118; *People v. Smith*, 57 Barb. 46; *Commonwealth v. McPike*, 3 Cush. 181; 50 Am. Dec. 727.

That one criminal offense may sometimes be merged in another is doubtless true. The principles upon which the doctrine of merger seems to rest are, that the offense merged is lesser than the one in which it is merged, and that the ingredients of the smaller one are so identical with the ingredients of the larger that when both have been committed they cannot in reason and justice be separated; so that to punish an accused in such a case for both offenses would be in effect to punish the same act twice. In the case above cited of *Commonwealth v. Kingsbury*, the reasons given seem to treat the conspiracy as the beginning of the very act, the ending of which was the felony or the misdemeanor. "There is at common law a wide distinction between a felony and a misdemeanor. It affects alike the punishment, the procedure, and several rules governing the crime itself. Out of the distinction grows the doctrine that the same precise act, viewed with reference to the same consequences, cannot be both a felony and a misdemeanor,—a doctrine which applies only when the same precise act constitutes both offenses": 1 Bishop's Crim. Law, 7th ed., sec. 787.

"It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so when the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it cannot be

merged. When two crimes are of equal grade, there can be no legal technical merger": *People v. Mather*, 4 Wend. 265; 21 Am. Dec. 122.

To make these principles available for the appellant, it must be shown that the conspiracy of which he was convicted is a crime of a lesser grade than the larceny which she claims was proved. In the absence of statutory graduation, there is no test by which to determine the grade of crimes other than the punishment which may be inflicted. Conspiracy may be punished by imprisonment in the state prison for a term not exceeding five years, and by a fine not exceeding five hundred dollars. Larceny to any value less than fifteen dollars can be punished by no more than thirty days in the county jail, and a fine of not more than seven dollars. By this test, conspiracy is much the greater crime.

Nor are the ingredients of conspiracy the same as of theft. Theft may be committed by one person as well as by two or more; it requires some physical act in the nature of a trespass, by which the possession of the thing stolen is taken from the owner, and the act must be accompanied by the intent of the thief to deprive the owner of his property. On the other hand, conspiracy cannot be committed except by two or more persons. It is the agreeing or confederating together by two or more persons to commit some crime or misdemeanor. Such confederation or agreement is itself the offense. Unlike theft, no overt act is necessary; the unlawful agreement makes the crime, and it is complete the moment the agreement is entered into: *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23; *Commonwealth v. Eastman*, 1 Cush. 228; 48 Am. Dec. 596. Its legal character depends neither upon that which actually follows it nor upon that which is intended to follow it; it is the same whether its object be accomplished or abandoned. It may be followed by one overt act, or a series, but as an offense it is complete without them: *Rex v. Rispal*, 3 Burr. 1320; *Rex v. Kimberty*, 1 Lev. 62. It is an offense falling within that part of the criminal law which seeks to prevent the commission of crimes. "The unlawful confederacy is therefore punished to prevent the doing of any act in the execution of it": 2 Swift's Digest, 350. It is a distinct offense, well known to the criminal law, depending upon clear principles, and having characteristics and ingredients which separate it from all other crimes; an offense the criminality of which is not to be measured by the criminality of its object: *Amos's Science of Law*,

256. "The confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint, although none would be necessary were the same thing proposed, or even attempted to be done, by any person singly. A solitary offender may be easily detected and punished. But combinations against law are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult": *Commonwealth v. Judd*, 2 Mass. 329; 3 Am. Dec. 54.

Upon the whole examination, we are of opinion, upon principle as well as upon authority, that this conviction for a conspiracy to commit theft ought to be sustained, although the evidence by which it was proved proved also that the theft had been actually committed.

There is no error in the judgment appealed from.

CONSPIRACY — WHAT CONSTITUTES THE CRIME: See *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note 474, 475, 491; *Crump v. Commonwealth*, 84 Va. 927; 10 Am. St. Rep. 395, and note.

MERGER OF CRIMES: Extended note to *Whitford v. State*, 5 Am. St. Rep. 899-901, where the merger of conspiracy in felonies is particularly discussed.

CONSPIRACY, WHAT IS NOT. — The act of several persons combining honestly to procure another to be prosecuted, while another complaint for the same offense is pending against him, in order to secure by honest means a judicial determination of his innocence, is not conspiracy or any indictable offense: *Commonwealth v. McParland*, 148 Mass. 127.

WREN v. PARKER.

[57 CONNECTICUT, 522.]

ADVERSE POSSESSION — EVIDENCE TO SHOW TITLE BY. — Adverse possession consists not simply of possession, but of a possession by the occupier claiming the land as his own, and denying the right of everybody else. And the fact that the occupier has paid the taxes upon the land is clearly admissible in evidence, as tending to prove the claim of ownership.

TAXATION — PAROL EVIDENCE TO APPLY ASSESSMENT TO ITS SUBJECT-MATTER. — Where, in an action for trespass on land, it is sought to prove that the land was assessed to the plaintiff, who claimed title by adverse possession, and the assessment list did not describe the property so particularly as to make it certain that it embraced the land in controversy, it may be shown by the testimony of the assessor who made the assessment, upon an actual view of the land, that it had been assessed to the plaintiff.

TRESPASS — NON-PREJUDICIAL ERROR IN CHARGE TO JURY. — In trespass *quare clausum fregit*, where the plaintiff claimed title by adverse possession, a charge to the jury that "interruption by a stranger is not sufficient to destroy or interrupt title by adverse possession," though erroneous, is not prejudicial, where there is no evidence tending to show that the plaintiff's possession had been interrupted.

W. H. Ely and G. W. Smith, for the appellant.

G. A. Fay and W. F. Davis, for the appellee.

ANDREWS, C. J. The complaint in this action alleged certain acts of trespass *quare clausum fregit* upon lands in the town of Meriden, of which the plaintiff claimed to be the owner by an adverse possession for more than fifteen years, with a claim, also, for damages to personal property on the land. The answer asserted title in the defendant, and admitted the acts of entry and the removal of the personal property. The case was tried to a jury in the city court of the city of Meriden, and a verdict was returned for the plaintiff. The defendant has appealed to this court.

Upon the trial the judge charged the jury: "That to entitle the plaintiff to recover, he must prove an actual exclusive possession under a claim of right; that the right of possession is usually the only question involved in an action of trespass, but in this case, as the defendant claims title, the plaintiff must prove actual exclusive possession, adverse, and under a claim of right, for a period of fifteen years last past before the trespasses complained of." The verdict finds all these things to be proved and true, and that the plaintiff has had the actual exclusive possession of the land in question, adverse, and under a claim of right, for a period of fifteen years last past before the acts of trespass complained of, and thereby establishes the plaintiff's title to and his possession of the land upon which the trespasses were committed. The verdict also establishes that the deed under which the defendant claimed the title to the land was void, because it was given by a grantor ousted of the possession, and not to the person in the actual possession of the land attempted to be conveyed.

This verdict is absolutely conclusive of the case unless there was some error in the course of the trial. Taken in their order, the errors assigned are: —

1. That the court erred in overruling the defendant's objection to the question asked of Mr. Miles, the assessor. The plaintiff was seeking to prove that he had been in the possession of the land, claiming it as his own, and among

other evidence for this purpose, he desired to show that he had paid the taxes thereon. To do this, it was necessary to prove that it had been assessed to him. The assessment list did not describe the property so particularly as to make it certain that it embraced the precise strip here in question, and he called the assessor of the town, who had made the assessment from an actual view of the land, and asked him the question which was objected to. We think the question was admissible. It is entirely analogous to the parol testimony by which a deed is applied to its subject-matter, or by which the bounds named in a deed are ascertained. The objection, however, goes a little further than this,—that the payment of taxes on land is not evidence at all of an adverse possession. Adverse possession consists not simply of possession, but of a possession by the occupier claiming the land as his own, and denying the right of everybody else. As tending to prove the claim of ownership, the payment of taxes seems clearly admissible. The payment of taxes is “powerful evidence” of a claim of right: *Ewing v. Burnet*, 11 Pet. 41, 54; *Farrar v. Fessenden*, 39 N. H. 268; *Paine v. Hutchins*, 49 Vt. 314.

The second assignment was abandoned by the defendant. The third, fourth, fifth, and sixth were all contingent upon a finding by the jury that the defendant was the owner of the land. As the verdict has found the other way, these assignments require no further notice.

The seventh is: “That the court erred in charging the jury that interruption by a stranger, that is, by one holding neither title nor possession at the time of the interruption, is not sufficient to destroy or interrupt title by adverse possession.” Admitting that this is erroneous as a proposition of law (and perhaps it is), still the jury could not have been misled, for the reason that there was no evidence tending to show, nor was there any claim, that the plaintiff’s possession had been interrupted by a stranger or anybody else.

The same may be said in regard to the eighth assignment. There was no evidence that the plaintiff had not been in the possession of every part of the premises in controversy for the whole fifteen years.

There is no error in the judgment complained of.

ADVERSE POSSESSION — PAYMENT OF TAXES. — Payment of taxes on realty is not an act of possession, nor is it evidence of a possessory title: *Tillotson v. Prichard*, 60 Vt. 94; 6 Am. St. Rep. 95, and note. The fact of payment of taxes in adverse-possession defenses is a matter of evidence

entirely, not a matter of pleading: *Ball v. Nichols*, 73 Cal. 193; compare *Pearson v. Creed*, 78 Id. 144. The requirement of payment of taxes as an element of adverse possession does not apply where no taxes have been assessed: *Oneto v. Restano*, 78 Id. 374.

ADVERSE POSSESSION, WHAT CONSTITUTES. — To render possession adverse, it must have been actual, visible, continuous, notorious, distinct, and hostile: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and cases collected in note 342, 343; *Black v. Pratt etc. Co.*, 85 Ala. 504; *Collet v. Board of Vandenberg Co.*, 119 Ind. 28; and under a privity of title: *Heflin v. Burns*, 70 Tex. 347.

ADVERSE POSSESSION — STATUTE OF LIMITATIONS. — The statute of limitations does not begin to run against the holder of a patent confirming a Mexican grant till the patent has been issued, and therefore adverse possession prior to such patent is not good as such: *Gage v. Downey*, 79 Cal. 141. Color of title cannot be said to exist where one of the links in the title chain has been procured by the fraud of him who claims thereunder: *Hussey v. Moser*, 70 Tex. 42; but one holding under a defective title, ignorant of any superior title, having used due diligence to know the condition of his title, may be said to hold and be in possession in good faith: *Johnson v. Schumacher*, 72 Id. 334. A grantor resuming possession, after having made a conveyance of land, does not hold under any title, or even color of title, and his right to reacquire title by adverse possession of ten years would be limited to the statutory amount of land, which, under the Revised Statutes, is one hundred and sixty acres: *Bullock v. Smith*, 72 Id. 545.

PECKHAM v. LEGO.

[57 CONNECTICUT, 552.]

WILLS — CONSTRUCTION. — IN CONSTRUING WILL, COURT SHOULD, IF POSSIBLE, AVOID ANY CONSTRUCTION which would result in partial intestacy. Another principle is, that the construction should be such as not to disinherit the heirs at law, unless on so strong a probability that an intention to the contrary cannot reasonably be supposed.

WILLS — CONSTRUCTION — GIFT OF USE AND IMPROVEMENT OF ESTATE DURING LIVES OF BENEFICIARIES. — A testatrix, by her will, gave to F. and his wife the "use and improvement" of certain estate "during their natural lives," continuing as follows: "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as possible for the children born to them." Under this will, the estate given to F. and his wife was a life estate only, with the right to use any portion of the property to the extent needed for their support in a manner suited to their condition and circumstances in life; and the remainder was given to the children born to F. and his wife, and not the heirs of the testatrix generally.

S. A. York, for Grace A. Peckham, one of the defendants.

G. P. Ingersoll, for the heirs at law.

LOOMIS, J. This suit was brought to obtain a judicial construction of the last will of Mary Yemmans, which is as follows: —

“1. I give and bequeath to my brother, John Lego, five hundred dollars.

“2. I give and bequeath to W. Frank and his wife Grace A. Peckham the use and improvement of the whole of the remainder of the estate of which I may die possessed, both real and personal, during their natural lives. Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as possible for the children born to them.

“3. I appoint W. Frank and Grace A. Peckham executors of this my last will and testament.”

The following facts are found by the court: The heirs at law in this case are John Lego, a brother of the testatrix, and the children of deceased brothers and sisters. Grace A. Peckham, one of the defendants, is a niece of the testatrix, and lived with and was brought up by her as a member of her family. After the marriage of W. Frank Peckham with said Grace, she and her husband and the testatrix lived together, with occasional intermissions, until the death of the testatrix. About the time of the execution of the will, the testatrix went to live with Mr. Peckham and his wife, and continued to reside with them to the time of her death. The other heirs at law, though not intimate, were on friendly terms with the testatrix. The property and estate of the testatrix came to her by the will of her late husband, Joseph Yemmans. A few days after the death of her husband, the testatrix made and executed the will, it having been drawn by Rev. E. E. Beardsley of New Haven.

The first question is, whether, under the second section of the will, Mr. and Mrs. Peckham take a fee or a life estate.

The intention of the testatrix, which is to control, must here be ascertained from the language employed by her in making the gift. In the first section she employed direct and fitting words in making an absolute gift to her brother, and had she intended a similar gift of the residue to the Peckhams, similar language most naturally would have been employed, being already in her mind. Instead of that, however, we find language of a contrary import; language which is

irreconcilable with the idea that she intended to give other than a life estate.

The language is doubly restrictive. In the first place, the bequest is guarded by the words "use and improvement," which alone would distinguish the gift from a fee, but to put it beyond all controversy, the tenure of the holding is expressly given as "during their natural lives." If the section stopped here, it is conceded that a doubt as to the meaning would be impossible; but the words which follow: "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much as possible for the children born to them," it is contended, remove the restriction twice applied in the preceding language, and enlarge what was plainly only a life estate and convert it into a fee. We fail to discover any such intention. The language necessarily implies a consciousness on the part of the testatrix that she had given only a life estate; but it occurs to her that the income may be so limited, and their circumstances so reduced, that they may lack the means of comfortable support, and she adds the clause under consideration to meet such an emergency, but this clause was never intended to sweep away the life estate. It was only to be called into play by an emergency,—by the needs of her beneficiaries. The right to resort to the principal was founded on necessity and restricted by necessity. The words are, "should it be necessary." If it should not be necessary, it is all a mere life estate; if it is, then the restriction is, that all except the necessary portion so taken remains a mere life estate. It is said that the words "necessary for their personal comfort" are indefinite in meaning, and practically unrestricted, and therefore inconsistent with any remaining life estate. We cannot accept this view. One of the definitions of "comfort" given in Webster's Dictionary, as applied particularly in law as well as in some other things, is "support." The language, therefore, must be held to mean "necessary for their support."

But it is said that it is again rendered indefinite by being all left to the judgment and discretion of the legatees as to the kind and extent of the support needed; that they may use the principal to gratify their mere whims and fancies. We do not think any such authority is given. For the time being they exercise their judgment, but are not the ultimate judges of what is necessary, but the superior court, as a court of equity, and perhaps in some cases the probate court, will

review and revise their judgment, and determine whether the exigency had arisen to give them any right to resort to the principal, and if so, whether they have exceeded the liberty given them.

But our attention has been called particularly to the concluding words, enjoining the exercise of good judgment on their part. We do not think the question of necessity is to be so determined. But the good judgment enjoined is to be exercised in saving as much as possible for the children within the field given of what is necessary. What is necessary in law does not always, nor often, mean a strict, absolute necessity. It is a relative term, and variable according to circumstances. It means here, as in the case of the obligation of a husband to furnish necessities for his wife, what is needed in reference to the situation and condition in life, and within those limits much may be saved by the exercise of good judgment.

If they act within the legal limits of a necessity in law they may not be responsible, but are if they appropriate a portion of the principal when not needed for their support.

If, now, we have discovered the intention of the testatrix as evidenced by the language of her will, a reference to artificial rules of interpretation would seem unnecessary, but as some of these rules were referred to in the discussion of this case as being opposed to the construction we have adopted, a brief discussion of the matter may seem desirable.

Hull v. Culver, 34 Conn. 404, was referred to as indorsing the principle that "where an estate for life is given, with power in the devisee to sell and dispose of it at his own discretion and for his own use, he takes a fee." In *Lewis v. Palmer*, 46 Id. 458, Carpenter, J., in giving the opinion of this court, very properly calls attention to the fact that the above proposition was stated as one which the counsel on both sides conceded, and that the court, without discussing it, immediately passed to the consideration of another question regarded as controlling, namely, whether the power of sale as there given was absolute or contingent. The language to be interpreted was as follows: "I give all my estate to my beloved husband, Ransom Culver, to use and improve during his natural life, and if he should want, for his support, to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." In construing this language the court said: "The great object is, of course, to ascertain the intention of the

devisor. If she had designed to give her husband the entire estate, it would have been very easy and very natural for her to say it in short and direct terms, or to place the disposal of it at his discretion, without imposing a condition. But she gives him the disposal only 'if he should want, for his support, to sell any part or the whole of it for his maintenance.' This language very clearly implies a limitation or restriction of the power to a case of necessity. The sale is to be proportioned to the extent of the necessity."

It will be seen that the court construed the authority to sell substantially as we do in the present case. So that even if the proposition referred to is a sound one, it would not apply to this case any more than to that one. But the proposition has been materially modified by the later utterances and decisions of this court. In *Lewis v. Palmer*, *supra*, the words of the will were: "I do give and devise unto my said sister, Sarah Palmer, the use of all the rest of my real estate that I may have or leave at my death, during her natural life, and for her to dispose of as she may think proper, right, or just." Here was plainly an unrestricted power of disposal at discretion, and yet the court did not hold that the legatee took a fee. The question, it is true, was left open, as the case could be disposed of upon another ground, yet the discussion plainly showed that the court was prepared to hold that a life estate created by express words would not be enlarged to a fee by the power of sale.

Afterwards, in *Grover v. Stillson*, 56 Conn. 316, the court was called upon to construe a will, where the words were: "I give the residue of my estate, both real and personal, unto my sisters Polly A. Stillson and Mary B. Stillson, for the term of their natural lives, hereby empowering my said sisters to dispose of any portion of my estate, either real or personal, if they should so desire." The court held that the sisters took only a life estate, notwithstanding their unrestricted power of disposal; and in giving the opinion of the court, Carpenter, J., said: "We are asked to say that the power of sale enlarges an express life estate to a fee. If we do so, what becomes of the intention of the testator? His intention to give pecuniary legacies to the parties named, and the residue to the orphan asylum, is just as certain, and we may add just as provident, as the intention to provide for his sisters; and that intention by the construction contended for is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention;

but to give it an artificial and technical force, and thereby defeat the manifest intention of the testator, is wholly inadmissible."

These utterances we think are in accord with the decided preponderance of judicial authority in the United States.

Chancellor Kent, in volume 4, side page 536, seventh edition, of his Commentaries, summarizes the settled doctrine as follows: "If an estate be given to a person generally, or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee."

It remains for us to consider a still more difficult question in regard to the disposition of the reversion: whether it belongs to all the heirs of the testatrix as intestate property, or whether the will takes hold of it and sufficiently designates the persons who are to take.

The language of the will is so unusual and so doubtful that at the outset we feel embarrassed by two independent principles of law operating in different directions at the same time. One requires the court to avoid, if possible, any construction which would result in partial intestacy: *State v. Smith*, 52 Conn. 563; *Warner v. Willard*, 54 Id. 472. The other cautions us not to disinherit the heirs at law, unless on so strong a probability that an intention to the contrary cannot reasonably be supposed: *Wigram on Wills*, 167; *Wilkinson v. Adams*, 1 Ves. & B. 456.

The residuary estate, it is conceded, is not expressly disposed of by the terms of the will, but there are words evincing, we think, an intention and desire on the part of the testator as to the disposition. We refer to the closing words of section 2. The testatrix, having in mind the life estate she has given, adds a conditional and restricted permission to use a portion of the principal or residuary estate, but in that connection enjoins the life tenants, in availing themselves of the permission, "to use good judgment, saving as much as possible for the children born to them." This implies that the children of the life tenants are to take the remainder, — all of it.

But does it imply that they are to take it under the will, or simply as her heirs at law? Her heirs are numerous; the record gives the names of eight besides the Peckhams, and the portion which the latter could inherit by right of representa-

tion would be insignificant as compared with the whole. If she referred at all to her own heirs, she would have so stated, and would not have restricted the benefit of the saving to children born to them, the Peckhams.

We do not think the language can be satisfied at all with any such reference as suggested, but that the words imply that the Peckham children are to take the remainder under the will, and not because they may become her heirs at law with many others. The question of implied gifts is in every case one of intention.

There are several instances where a devise by implication has received the sanction of this court. We will mention only two. The first is the case of *Minor v. Ferris*, 22 Conn. 371. A testator, after devising his real estate for the benefit of his wife, and directing his executor to sell it within one year, and to invest the proceeds in some safe property, to remain a fund for her support during life, gave to his sister, if living at the decease of his wife, and if not, to her children, whatever of the property might be left. He then bequeathed to his sister, in general and unrestricted terms, all his personal estate. In a subsequent clause he authorized his executors, if they deemed it advisable, to extend the time of selling the real estate for eighteen months, and expressed his opinion that if the property was well sold and invested the interest would support his wife; then he repeated his bequest to his sister, or if deceased, to her children, of all his personal property; adding, "if my wife has sufficient to support her." Counsel for the sister contended that the last clause must either be rejected as without meaning, or, as explained by the context, it must be construed to mean "as my wife has sufficient to support her," the testator having just expressed an opinion to that effect; but the court did not accept this view, but, upon the ground of a prevailing intention apparent on the face of the will to provide for his wife ample support during life, and that the last clause was a qualification of preceding bequests, held that all the personal property was by implication given for the benefit of the wife during her life, upon the same terms as those upon which the real estate had been devised.

The other case is that of *Holbrook v. Bentley*, 32 Conn. 502, where a testator bequeathed to his wife the use of three thousand dollars, and also gave her absolutely all his household furniture, with a few exceptions mentioned, and then added a clause in this form: "What follows is after the death of my

executrix [his wife]. I do will and bequeath all the remainder of my estate indiscriminately, be it money or household furniture, equally to all my grandchildren."

There was thus left a considerable amount of personal property not expressly disposed of during the life of the widow, and which would, if regarded as falling into the residuum, be left in the hands of the executrix to accumulate for the grandchildren. It was held, as this intention was improbable, and there were no words to indicate it, and no provision that the executrix should hold the property as trustee for the grandchildren, that the will should be construed as giving, by implication, to the widow the use of this property for life. Here, it will be seen, there were no express words at all indicating a desire that the widow should have this property, and all her express bequests were precisely defined. It seems to us that, in the present case, there is at least as good a foundation in the will for the implication of a devise as in the cases cited.

Many similar illustrations of implied gifts might be cited from other jurisdictions, but we will refer to two cases only.

In *Edens v. Williams*, 3 Murph. 37, there was a gift of certain property to the testator's wife, and if she should prove *enceinte*, such child should be supported and educated out of the income of the property so left her, "as well as all the property I may die possessed of," with a residuary bequest to nieces. The court held that the whole estate was given, by implication, to the wife and child, on its birth. In *Piper's Estate*, 83 Leg. Int. 228, a direction that the mansion-house should not be sold during the daughter's life, but that she might reside in it, was held to give a life estate.

The superior court is advised that, under the will of Mary Yemmans, W. Frank Peckham and his wife, Grace, take a life estate in the remainder, with the privilege of disposing of or using any portion of the principal to the extent needed for their support and maintenance in a manner suited to their condition and circumstances in life, and that the children born to them take a vested interest in the remainder.

WILLS. — Heirs are favorites of the law, and are never excluded from an inheritance upon mere conjecture: *Saylor v. Plaine*, 31 Md. 158; 1 Am. Rep. 34.

PARTIAL TESTACY. — There is a presumption against the intention of a testator to leave part of his estate intestate: *Warner v. Willard*, 54 Conn. 470.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BLOCK v. HENDERSON.

[82 GEORGIA, 22.]

JURISDICTION — JUDGE ACTING OUTSIDE HIS DISTRICT. — Where a magistrate goes outside the limit of his jurisdiction and undertakes to hold his court, he neither has jurisdiction of the subject-matter nor of the person, and no waiver or agreement there made before him can confer jurisdiction upon him.

Alexander Proudfit, for the plaintiff in error.

J. A. Thomas, and Turner and Willingham, by Harrison and Peoples, for the defendant in error.

SIMMONS, J. Charles Taylor sued out an attachment against Kate Mullenix for the purchase-money of certain furniture, which attachment was levied upon the furniture. N. M. Block filed a claim thereto, and gave a claim bond, with A. Block as surety. The attachment was made returnable to the justice's court of the 716th district, G. M. Matt R. Freeman, the magistrate who issued the attachment, was notary public and *ex officio* justice of the peace in and for that district. When the trial of the claim came on, said Freeman held his court in the 564th district, and on the trial of the claim, dismissed the same. The property for which the claim bond was given was then advertised for sale by the constable, and on the day of sale the claimant failed to produce the property, as he agreed to do in his claim bond. Henderson, the constable, then brought suit upon the claim bond in the city court of Macon, alleging as a breach thereof that Block, the claimant, had failed to produce the property on the day

of sale. Block and his surety filed certain pleas to this suit, among them, that there had been no forfeiture of said bond, because there had been no legal trial of the claim case, the claim case having been tried by the magistrate outside of his district, and that therefore the magistrate had no jurisdiction to try the case. The plaintiff replied to this plea, and said that while it was true that said claim case had been tried outside of the district of the magistrate, Block had agreed thereto, and had thereby waived the jurisdiction.

On the trial of the case before the judge of the city court without a jury, these facts having been made to appear to him, he decided that, the jurisdiction having been waived, the judgment of the magistrate dismissing the claim case was a valid and binding judgment; and as the claimant had not produced the property on the day of sale, the plaintiff in the suit on the bond was entitled to a judgment against said claimant. This ruling of the judge, and others which it is unnecessary to mention here, were carried by writ of *certiorari* to the superior court; and upon hearing the same, the judge of the superior court overruled the *certiorari*, and dismissed it; whereupon Block excepted, and brought the case here for review.

We think that the exception of the plaintiff in error as to the jurisdiction of the magistrate was well founded, and that the judge of the superior court should have sustained the same. Whenever a court has jurisdiction of the subject-matter of a suit, the defendant therein can waive the jurisdiction as to his person; but if the court has neither jurisdiction of the subject-matter nor of the person, no waiver by the defendant can give the court jurisdiction. If, in this case, the magistrate had held his court within the limits of his jurisdiction, and the defendant had resided outside of those limits, and had gone before the magistrate and waived the jurisdiction as to his person, and the magistrate had entered up judgment against him, that judgment would have bound him. But when the magistrate went outside of the limits of his jurisdiction and undertook to hold his court, he neither had jurisdiction of the subject-matter nor of the person, and no waiver or agreement made before him outside of his jurisdiction could confer jurisdiction upon him. Outside of the limits of his district, he was not a judge. He was no more than any private citizen; and any judgment he gave outside of his jurisdiction, whether by agreement, waiver, or otherwise, was

no more binding upon the parties than if it had been made before a private individual. If the judgment in this case had been executed by selling the property, and Block's standing by, seeing it sold and helping to sell it, as Reichert did in the case of *Reichert v. Voss*, 78 Ga. 54, and innocent third parties had purchased the property, then Block would have been bound, as Reichert was in that case; not because the judgment was a valid one, but because he had stood by and allowed an innocent party to purchase the goods, without any notice on his part. He would have been estopped from asserting his rights after inducing innocent parties to purchase his goods, as was done by Reichert in the case above alluded to. But in this case the facts are entirely different. The rights of innocent third parties are not involved. The litigation is between the same parties. Block insists that there has been no forfeiture of his bond, because the judgment of the magistrate dismissing his claim was an illegal and void judgment, having been made by the magistrate outside of the district in which he had jurisdiction; and we think this exception was well founded, and should have been sustained by the court.

Judgment reversed.

JURISDICTION. — Consent cannot confer jurisdiction where it is denied by law: *Bent v. Graves*, 3 McCord, 280; 15 Am. Dec. 632; *Roy v. Hersley*, 6 Or. 382; 25 Am. Rep. 537, and note 539-541.

GEORGIA RAILROAD AND BANKING CO. v. USBY.

[82 GEORGIA, 54.]

WHETHER BY THE USE OF ORDINARY CARE a pregnant woman could avoid the consequences to herself of the negligence of a railway company in not providing a safe and suitable landing-place to alight from the cars, the conductor having designated the place as suitable and assisted her to alight, is a question for the jury. The matter being doubtful, and the doubt not being soluble by the record to the satisfaction of this court, the judgment of the superior court denying the company a new trial will not be reversed.

THE LIKE RULE HOLDS TOUCHING THE QUESTION whether, after receiving the injury, the woman could, consistently with ordinary prudence, undertake a short journey to reach her home, rather than remain at the station and take immediate precautions to obviate the threatened consequences. **ALTHOUGH IN STRICT PRACTICE A RULE NISI FOR A NEW TRIAL** seems requisite, yet it need not be separate from the motion, nor be signed by the judge, if the judge on hearing the motion can and will recognise as the

rule that which has been signed by counsel. More especially is this so where opposing counsel has also recognized it in his acknowledgment of service. If such irregular rule has not been entered on the minutes, it may by order of the judge be entered *nunc pro tunc*.

J. B. Cumming, J. C. C. Black, Bryan Cumming, and W. D. Tutt, for the appellant.

Thomas E. Watson, for the respondent.

BLECKLEY, C. J. 1, 2. Mrs. Usry, in alighting from a regular passenger train at a regular station, being slightly advanced in pregnancy, was injured, so that miscarriage ensued, and serious illness followed. She obtained a verdict against the company for one thousand dollars, and the superior court refused a new trial. The sole ground of the motion insisted on in the bill of exceptions, and argued here, is, that the verdict is contrary to the charge of the court touching the duty to observe, and the effect of omitting, ordinary care on the part of Mrs. Usry herself at and immediately after the injury. What we have to rule on the subject is stated briefly, but accurately, in the first and second head-notes of this opinion. Such knowledge as we possess in respect to risks with prudent women may or may not be taken in the early stages of prospective maternity does not enable us to detect, in the light of the record before us, the mistake of the jury, if they committed any, in deciding the question of fact with which they had to deal. The conformity of their verdict to law, and the charge of the court, depends upon whether they had a correct standard of the prudent pregnant woman in their minds, and whether they correctly compared therewith the conduct of Mrs. Usry. We can only hope the jury went right in both these respects; for the plain truth is, we do not know whether they did or not. They have the support of our learned brother who presided at the trial, and who approved their verdict by refusing a new trial. We are not free from painful doubt and uncertainty, but this very fact admonishes us to beware of invading the province of the jury. We have not failed to scrutinize the facts and study the case closely, but with the result stated.

3. On the cross-bill of exceptions, which complains of the refusal of the court to dismiss the motion for a new trial for lack of a formal rule *nisi*, we entertain no doubt: See third head-note. According to *McIntire v. Tyson*, 56 Ga. 468, the rule *nisi* may be waived indirectly as well as directly, and it

may even be granted at a term of the court subsequent to that at which the motion was made. Here there was an informal but substantial rule, and counsel acknowledged service upon it, and the judge recognized it as a rule.

Judgment affirmed.

NEGLECTENCE IS ORDINARILY A QUESTION FOR THE JURY TO DETERMINE: *Durbin v. Oregon R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and numerous cases cited in note 785; *Trinity etc. R. R. Co. v. Schofield*, 72 Tex. 496; *Galveston etc. R'y Co. v. Porfert*, 72 Id. 344; *Kansas etc. R. R. Co. v. Dorrough*, 72 Id. 108; *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254. But when there is no dispute as to facts, the court may determine whether the established facts constitute negligence or not: *Chicago etc. R. R. Co. v. Ostrander*, 116 Ind. 259; *Bennett v. Syndicate Ins. Co.*, *supra*.

BIRDSEYE v. UNDERHILL.

[82 GEORGIA, 142.]

CONFLICT OF LAWS. — ASSIGNMENT MADE IN NEW YORK and legal there, and not intended to take effect in Georgia, is admissible in evidence in the latter state to show the right of the assignee to debts due the assignor there, though there is no schedule and list of creditors attached to the assignment, as required by the statute of the latter state.

CONFLICT OF LAWS — FOREIGN ASSIGNMENT. — While if a contract contravenes the policy of the law of Georgia it will be held void in that state, still the statute requiring schedules to be annexed to a deed of assignment does not make such schedules a part of the contract, nor does such statute apply to contracts or assignments made outside the state.

Hoke and Burton Smith, for the plaintiff in error.

Calhoun, King, and Spalding, for the defendant in error.

SIMMONS, J. It appears, from the record in this case, that Baker and Clark, merchants, doing business in the state of New York, on the 24th of November, 1886, made an assignment to C. F. Birdseye of "all and singular their copartnership and individual estate and property, real and personal, of every kind whatsoever, and wherever situated, held by and in the name of said parties, . . . except such property as exempt by law from levy and sale." In this deed of assignment preferences were made of certain creditors. On the 7th of November, 1886, Stephen Underhill, a non-resident of Georgia, instituted his action in this state against said non-resident assignors by attachment and garnishment, and summons of garnishment was served upon several of their debtors residing in this state. The garnishees answered, admitting their in-

debtedness. Birdseye, the assignee, appeared in court and claimed the assets as belonging to him as an assignee. The case was submitted to a trial judge, without the intervention of a jury, upon the following statement of facts: "1. This paper shall be construed as a properly made claim by C. F. Birdseye, assignee, for all assets garnished; 2. The debts of plaintiff are due and correct; 3. Plaintiff (Underhill) resides outside of the state of Georgia; 4. The firm of Baker and Clark, both of whom reside out of Georgia, executed an assignment to C. F. Birdseye on November 24, 1886, a copy of which is hereto attached. The assignment was a general assignment executed in New York, and was a legal assignment under the laws of New York. There was no schedule of assets attached to the assignment as provided for in section 1953 d and 1953 e of the code, nor of creditors, as provided for in Acts 1884-85. The assignment covered, amongst other property elsewhere, choses in action in Georgia; and this claim of Birdseye, assignee, only applies to choses in action in Georgia, the attachment not having been levied upon anything else; 5. There is no agreement as to whether notice of the assignment was served on the garnishee before the garnishments were served, and each side reserves the right to suspend the case at any time and have evidence taken on this point."

On this statement of facts, the trial judge decided that Birdseye, the assignee, was not entitled to the fund in court, and rendered a judgment in favor of Underhill, against Baker and Clark, for the amount they were indebted to Underhill, and a judgment against Birdseye, the assignee, for the costs. To this ruling the assignee excepted, and brought the case here for review.

1. The main question before us in this case was, whether this assignment, made in the state of New York, was void under the laws of Georgia. It was insisted by counsel for the defendant in error that it was void under our law, because the assignors did not attach thereto a properly sworn to "full and complete inventory and schedule of all the assets of every kind held, claimed, or owned by said firm at the time of the execution of the assignment," and also a "full and complete inventory and schedule of all indebtedness of every kind of said firm at the time of the execution of the assignment, and the names of, the amounts due to, and the residence of each creditor of said assignors," properly sworn to, as required by the acts of 1881 and 1885. It was insisted that for this rea-

son the assignment was void, being in violation of the policy of our law. It was admitted that, under the laws of New York, it was a legal assignment.

Section 8 of our code declares that "the validity, form, and effect of all writings or contracts are determined by the laws of the place where executed. When such writing or contract is intended to have effect in this state, it must be executed in conformity to the laws of this state, excepting wills of personalty of persons domiciled in another state or country." Here, then, is an assignment or contract which it is agreed was a valid and legal contract under the laws of the state of New York; and under this section of the code, its validity, form, and effect are to be determined by the laws of that state. It is claimed that this assignment or contract was intended to have effect in this state, because it was introduced in the court below as evidence, and under it this fund was claimed; and that, therefore, it must have been executed in accordance with the laws of this state, which require a schedule of assets and of indebtedness to be attached to the assignment as part of the execution thereof. We can see nothing in this assignment that shows that it was intended to have effect in this state. It appears from the face of it that it was an assignment in the state of New York, and not intended to have effect in this state alone, but to have effect generally wherever the assignors had property. We do not think that the latter part of section 8, *supra*, applies to contracts of this sort. We think that that part of the section means that if this contract had been made in New York, to be performed in this state, then it must be executed in accordance with the laws of this state. But as we have seen, the contract was intended only to have effect in the state of New York. It may be said, however, that Baker and Clark, the assignors, had debts due them by citizens of this state, and those debts were assigned in this instrument, and to that extent it was intended to have effect in this state. We do not think that this is a sound proposition. The debt owed them by the garnishees in this state had no *situs* in this state. The rule is, that the *situs* of a debt follows the creditor, and where the debtor and creditor reside in different states, the law of the domicile of the creditor prevails. A debt is not a *corpus* capable of local position, but purely a *jus incorporale*: Story on Conflict of Laws, 8th ed., 559. "A chose in action cannot surely be said to have any actual *situs* in the place where the debtor resides. As a general principle,

it is payable at the residence of the creditor, if not expressed or otherwise, and a tender, to be good, must be made to the creditor": Burrill on Assignments, 471. The situs of the debt being at the domicile of the creditor, the creditor had a right to transfer it to his assignee for the benefit of his creditors: Story on Conflict of Laws, 558, says: "The reasoning of Lord Kenyon in a celebrated case (*Hunter v. Potts*, 4 Term Rep. 182, 192) would certainly lead to the conclusion that an assignment of personal property, whether it were of goods or debts, according to the law of the owner's domicile, would pass the title, in whatever country it might be, unless there were some prohibitory law in that country."

2. But it is said that the assignment, not having attached thereto the schedules of assets and of indebtedness as required by our law, contravenes the policy of our law, and is therefore void. That is true if these schedules are a part of the contract. Our law is, that whenever the contract itself violates the policy of our law, it is void, and cannot be enforced in the courts of this state. We are referred to the following cases to show that this assignment is void: *Herchfeld v. Drexel*, 12 Ga. 582; *Stricker v. Tinkham*, 35 Id. 176; 89 Am. Dec. 280; *Mason v. Stricker*, 37 Ga. 262; *Miller v. Kernaghan*, 56 Id. 155; *Princeton Mfg. Co. v. White*, 68 Ga. 96.

We have carefully read the cases referred to, and such of them as are in point establish the principle we have just laid down; that is, that if the contract itself contravenes the policy of our law, it will be void in this state. In the cases in 12 Georgia, 35 Georgia, and 37 Georgia, *supra*, the assignments gave a preference to one creditor over another, which at that time made them void under our law; and the property in each of those cases was situated in this state. We do not think that the acts of the legislature requiring schedules to be annexed to the deed of assignment make these schedules a part of the contract; nor do we think that these acts apply to contracts or assignments made out of this state. An inspection of the acts relied on will show that it was not the intention of the legislature that they should affect contracts or assignments other than those made in this state. While it is in the power of the legislature to enact laws declaring that all assignments made out of this state and not executed in conformity with our law shall be void as to property found here, we do not think it has done so. We think these requirements concerning schedules were made for the protection of the credi-

tors of the assignors, and were intended to prevent fraud on the part of the assignors, by throwing greater restrictions around assignments, and compelling the assignors to give a correct statement under oath to their creditors of all their assets, and of all their indebtedness, and of the persons to whom they were indebted, and where those persons reside. We therefore do not think that the schedules are parts of the contract; and, as we have seen, it is only when the contract element violates the policy of our law that the assignment is void. We are strengthened in this view by the following decisions made in other states upon questions somewhat similar to the one now under discussion:—

In case of *Sanderson v. Bradford*, 10 N. H. 260, it was ruled that although the oath of the assignor, made in Massachusetts, and sufficient in that state, would have been insufficient in New Hampshire, and would have rendered the assignment void if made in New Hampshire, yet the assignment being valid in Massachusetts, the assignment would be held to be valid in New Hampshire. In Vermont the statute required an inventory of all the property assigned to be attached to the assignment; an assignment was made in New York without this inventory; and it was held that a New York assignment without this inventory would be valid, and that the statute of Vermont requiring the inventory to be attached to the assignment did not apply to assignments made out of that state: *Hanford v. Paine*, 32 Vt. 448; 78 Am. Dec. 586. See the able and learned opinion of Chief Justice Redfield in that case. See also *Atwood v. Protection Ins. Co.*, 14 Conn. 555. In *Ockerman v. Cross*, 54 N. Y. 29, the court held that the statute law of New York regulating assignments for the benefit of creditors did not apply to foreign assignments, and that such assignments, if valid by the law of the place where made, although not in conformity to the law of New York, would protect the property assigned from attachment. The same principle was held in the case of *Bentley v. Whittemore*, 19 N. J. Eq. 462; 97 Am. Dec. 671; also in the case of *Chaffee v. Fourth National Bank*, 71 Me. 514; 36 Am. Rep. 345. In *In re Paige and Sexsmith Lumber Co.*, 31 Minn. 136, it was held that “the statute which declares void assignments not made to residents of this state, and such as are not filed as prescribed, was intended to apply only to assignments made within this state. It does not change the unwritten law relative to the validity of foreign assignments.” In the case of *Weider v.*

Maddox, 66 Tex. 372, 59 Am. Rep. 617, it was held that if a voluntary assignment covering property in more than one state is deemed valid, it would be sufficient under the law of the domicile of the assignor, and under the law of the state where the property is situated, to pass title, notwithstanding the local laws regulating the administration of the trust property be not complied with.

It therefore appearing that this was a legal and valid assignment in the state of New York, where it was made, and that it was not intended to take effect in the state, that no part of the contract of assignment contravenes the policy of our law, and that the assignor had no property in the state, and the requirement of our statute as to schedules being no part of the contract, it follows that the judgment of the trial judge was erroneous and must be reversed.

CONFLICT OF LAWS — ASSIGNMENT FOR THE BENEFIT OF CREDITORS. — Assignments made in one state with preferences there allowed, are void as to property situated in another state, where such preferences are against the law: *Ex parte Dickinson*, 29 S. C. 453; 13 Am. St. Rep. 749, and cases cited in note.

PALMER v. MOORE.

[82 GEORGIA, 177.]

WILLS — POWER OF EXECUTOR TO CONTRACT DEBTS. — Direction in a will to keep the estate together, and to manage, control, and keep up the farming interests therein, confers a limited power on the executor to create such debts as would ordinarily be incurred by a prudent farmer in conducting farming operations, and such power may be exercised by an administrator with the will annexed, it not being such a power as manifestly arises from personal trust.

R. O. Lovett, for the plaintiffs in error.

BLECKLEY, C. J. The action was complaint in the short statutory form, by Moore against the two Palmers, one described as administrator, the other as administratrix *de bonis non* with the will annexed, of Robert A. Rowland, deceased. The declaration was based on an account, and referred to a copy annexed. An account was annexed, which debited the administrator to the plaintiff, Moore. The copy of a promissory note was also annexed, signed by Palmer, "Adm'r," and payable to Moore.

It appeared on the trial that Rowland died testate; that his

widow qualified and acted as executrix; that after several years she married Palmer, whereby her letters testamentary abated; that letters of administration *de bonis non* with the will annexed were then granted to Palmer; that he contracted the account sued on, and that afterwards the like letters were granted to Mrs. Palmer; so that at the time suit was brought, Palmer and wife seem to have been joint representatives of the testator's estate. It further appeared that the account was correct, and was for supplies purchased by Palmer as administrator, for the use of the estate in carrying on the farms belonging thereto. On inspection of the items, it is obvious that the supplies were appropriate to the use for which the account was contracted, and it is not contended that they were not so, or that the amount is excessive, or that the estate did not get the benefit of any of the purchases, the sum total being \$183.87. The will of the testator provided and directed as follows: "I desire and direct that my estate shall be kept together as long as practicable; that is to say, as long as it may be profitable or advantageous. With this view, my executrix shall have full power to manage and control and keep up my farming interest, either by the tenant or wages system, or both, as she may think best. If at any time, however, my executrix should, upon the advice and consultation with her friends, deem it to the best interest of my estate to have a division, then she shall have full power to do so."

The facts not being in dispute, the question of law was submitted to the presiding judge, whether the administrators are liable as such to pay the account. The judge held them liable, and entered judgment against them *de bonis testatoris*. This is the judgment excepted to.

It will be observed that the judge was called upon to decide no question on the pleadings. Both parties treated the declaration as sufficient to bring up the merits. The consent order by which the legal problem was raised and referred to the judge declares that "the only question in said case is one of law as to the liability of the defendants to pay the debt under the said facts and the will of R. A. Rowland."

1. It is certainly true, as a general rule, that the representative of an estate, whether executor or administrator, has no power to contract debts, and render the assets liable for their payment. The rule is not only well founded in law, but is sound and wholesome in principle and policy. But we think an express direction in the will of a testator, such as that

recited above from the will of Rowland, confers a limited authority to create such debts as would ordinarily be incurred by a prudent farmer in conducting farming operations. It is matter of common knowledge and contemporaneous history that farming in Georgia is done chiefly on a credit, and that such has been the current course of business for many years. No doubt those who deal with executors and give them credit must see to it that they are clothed with power to carry on business in behalf of the estate, and that what is sold to them is appropriate for use in such business, and perhaps, also, that the amount is not grossly excessive. It is proper, too, in bringing suit against them, to set out the facts which render them liable, just as ought to be done in suing any other trustees where it is sought to obtain judgment binding trust assets. Here, as we have remarked, there is no question of pleading.

2. It is said, however, that, granting the executrix had the power to contract debts, it was a personal trust, and could not be executed by an administrator with the will annexed. The code, section 2440, declares that such administrator "shall have the powers of the executor, except such as manifestly arise from personal trust and confidence placed in the executor named." The duty of keeping the estate together, and of managing, controlling, and keeping up the farming interest, seems, in the will of Rowland, to appertain to the office of executrix, and could as well be performed by a man chosen by the ordinary as by the widow. Even the discretion of continuing or discontinuing the business might be as soundly exercised. If farming was a business in which it could be supposed the widow had some special skill or tact of management, or some superior judgment in deciding whether to go on with it or suspend it, there would be good reason for treating the power conferred on her as a personal trust, but there is no suggestion in the record on this subject further than what appears on the face of the will. We cannot say that the power in question is such as manifestly arises from personal trust and confidence in the executrix.

On the one legal question submitted, the judge below decided correctly.

Judgment affirmed.

EXECUTORS AND ADMINISTRATORS. — An executor cannot borrow money for his testator's estate, unless expressly authorized to do so by the will:

Lucick v. Medina, 3 Nev. 93; 93 Am. Dec. 376; but see *Blanton v. Mayor*, 72 Tex. 417, as to an executor's power to borrow money to pay taxes.

AN EXECUTOR CAN DO ANYTHING WITHIN THE GENERAL SCOPE of his powers, without personal liability, so long as he exercises the care and discretion to be expected of an ordinarily prudent and sagacious man: *Heister v. Mercer*, 44 N. J. Eq. 167.

MAYOR OF MONTEZUMA v. WILSON.

[82 GEORGIA, 208.]

MUNICIPAL CORPORATIONS — NOTICE — NEGLIGENCE. — A municipal corporation cannot be held liable for damages occurring by reason of a defect in its streets, sidewalks, sewers, or bridges, when it had no notice thereof, nor when such defect has not existed for sufficient time from which notice can be inferred; provided the corporation has been guilty of no negligence in constructing or repairing the same.

PLEADING AND PRACTICE. — WHERE PLAINTIFF RECOVERS on a different cause of action from that set out in the declaration, the verdict and judgment are contrary to law, and a new trial should be awarded.

E. G. Simmons, for the plaintiff in error.

J. M. Dupree and E. A. Hawkins, for the defendant in error.

SIMMONS, J. Wilson sued the mayor and aldermen of Montezuma for damages. In his declaration, he alleged that on the 13th of August, 1885, he was walking on the sidewalk of a street in that town at night, and when crossing a little bridge or crossway across said sidewalk, covering a ditch two feet deep, he stepped into a hole in the sidewalk, and near said crossing, and fell into the ditch, whereby he was injured. He alleged that this crossing was badly constructed, and that between the outer planks and the earth was a hole about six inches by twelve, through which the petitioner fell. On the trial of the case, the jury found a verdict for the plaintiff, and the defendants made a motion for a new trial, which was overruled by the court, and they excepted.

1. The grounds urged before us in the argument for a reversal of the judgment in this case were, that the verdict was contrary to evidence and to law. We think that the court below should have granted a new trial on both of these grounds. The plaintiff made an entirely different case by his evidence from what he alleged in the declaration. In that declaration, he alleged that he fell through a bridge across the sidewalk. No act of negligence on the part of defendants was alleged by him in his declaration. The only

act which he alleges in any way tending to charge negligence against the defendants was, that the bridge was badly constructed. The evidence in the case shows that the place where the plaintiff was injured was not a bridge, but a sewer a foot and a half under the ground, and that the plaintiff was injured, not by falling through the bridge, nor on account of the bridge being badly constructed, but by stepping into a hole which had been made by a recent rain on the side of the sewer. The plaintiff, therefore, recovered on a different cause of action from that set out in his declaration. When a plaintiff brings a case into court, and makes certain allegations on which he seeks to recover against the defendant, he must abide by those allegations. He cannot set up one state of facts in his declaration, and recover upon an entirely different state of facts in the evidence. If he cannot prove the allegations made in the declaration, then he must amend it so as to meet his proof, provided he does not set up a new cause of action. In this case, no amendment was offered or made, and, as said before, he recovered on a different state of facts from that alleged in his declaration; and this was contrary to law.

2. We also think that the verdict was contrary to the evidence. The overwhelming weight of the evidence was, that it had been raining in that vicinity for about three weeks, and that on the afternoon before this plaintiff was injured, the hardest rain of the season had fallen. Before this rain, and afterwards, the marshal of the town, whose duty it was to look after the streets and sidewalks, went to this place and examined it carefully, and he could not detect any defect in the sidewalk or the sewer. He had been instructed by one of the street committee to look closely after the streets and sewers, particularly in that part of the town, on account of a "protracted meeting" in progress in that part of the town. If this witness and others are to be believed, there was no defect in this sewer on the afternoon of the day in which plaintiff was injured. The injury was caused on account of the dirt and sand becoming very wet from hard rains and caving in on the side of the sewer. If any acts of negligence had been alleged against the defendants in the declaration, we think that the evidence would have fully disproved them. According to the evidence in this record, the officers and servants of this municipal corporation exercised all the care and diligence that was possible under the circumstances. They examined

this sewer twice in one day. It had been there for years, and nothing had ever occurred to put them on notice that there was any defect in the sewer, or that it was dangerous, or likely to become so. A municipal corporation cannot be held liable for damages occurring by reason of a defect in its streets, sidewalks, sewers, or bridges, when it had no notice thereof, or when such defect has not existed for a sufficient length of time from which notice can be inferred, provided the corporation has been guilty of no negligence in constructing or repairing the same. According to the testimony in this case, this defect was of such a recent origin that the officers of the town government could not possibly have had notice of it; and we think, therefore, that the jury found contrary to the evidence.

Judgment reversed.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — NOTICE. — A city must have notice of the defective condition of its streets before liability can attach for injuries sustained by reason thereof: *Dundas v. City of Lansing*, 75 Mich. 499; 18 Am. St. Rep. 457. As to what constitutes notice of defects in sidewalks to a municipality, see *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144. Compare *Weber v. Creston City*, 75 Iowa, 16, in which case it is held that a city is always charged with notice of the manner in which its sidewalks were constructed; and if constructed in an improper manner, so as to be defective, or liable to become so, no further notice need be brought to the city to make it responsible for injuries resulting from such defects.

ROSSER, ARMISTEAD, & Co. v. DARDEN.

[82 GEORGIA, 219.]

AGENCY — RIGHTS AGAINST PRINCIPAL WHERE AGENCY IS CONCEALED. —

While a principal may take advantage of any contract made by his concealed agent, still where the principal agrees that the agency may be concealed, third parties contracting with the agent are entitled to all the equities and defenses which they would have had against the concealed agent, the same as if he had been the principal.

AGENCY — RIGHTS AGAINST PRINCIPAL WHERE AGENCY IS CONCEALED. —

Where an owner has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade or common understanding of the world, usually accompanies the authority of disposal, or has given the external *indicia* of the right of disposing of his property, he loses the right of following it. However the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

L. Z. Rosser and J. A. Anderson, for the plaintiffs in error.

Candler, Thomson, and Candler, for the defendant in error.

SIMMONS, J. It appears, from the record in this case, that Darden raised twelve bales of cotton on his farm, which he carried to Milner, and stored in the Empire warehouse. He then turned it over to English, a merchant and cotton-buyer of Milner, with the understanding and agreement between him and English that English was to ship it in his own name to a commission merchant in Atlanta. He agreed to this because he thought English could get a better price for it if shipped in English's name. English accordingly shipped the cotton in his own name to the plaintiffs in error, taking the bill of lading in his own name, and sending a duplicate thereof to the plaintiffs in error. English was indebted to the plaintiff in error at the time the cotton was shipped to them. When they received the cotton they sent English, at his request, one thousand dollars more, with which to purchase other cotton to be shipped to them. They sold Darden's twelve bales of cotton, and accounted to English for the sale thereof. English subsequently failed, by reason of his goods and storehouse having been consumed by fire. The plaintiff in error, in these transactions, knew nothing of Darden, had never heard of him or that this cotton belonged to him, and dealt only with English. Darden brought this action against the plaintiffs in error for the proceeds of the cotton, and the jury returned a verdict in his favor for the same. The plaintiffs in error moved for a new trial upon several grounds, the motion was overruled, and they excepted.

Among the grounds taken in the motion was, that the verdict was contrary to the evidence. While the law seems to be well-settled that a principal may take advantage of any contract made by his agent, whether the agency is disclosed or undisclosed, we do not think that the rule, pure and simple, applies to this case, under the facts as disclosed by this record. While the facts show that English was the agent of Darden, they show further that, by agreement, this agency was to be concealed from third parties, the cotton being shipped in the name of English in order that a better price might be obtained. We think that where a principal agrees that the agency may be concealed, the rule above announced applies, with this qualification, that third parties contracting with the agent would be entitled to all the equities and all the defenses which they

would have had against the concealed agent, the same as if they had treated with him as principal: Code, sec. 2204. In this case, the plaintiffs in error had no knowledge of the principal, nor could they have had if they had inquired of English, the agent; because, as before, said it was the agreement that this agency should be concealed. It would be wrong, in our opinion, to allow the principal, after he has authorized his agent to sell and receive the proceeds of sale, and after the proceeds of the sale had been paid to his agent, and the agent has failed, to recover the moneys from third parties, without allowing the third parties their defense against such concealed agent. The record shows that Darden voluntarily clothed English with the apparent ownership and the authority to sell this cotton and to receive the proceeds thereof. Where an owner has by his own voluntarily act or consent given to another such evidence of the right of selling his goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external *indicia* of the right of disposing of his property, he loses the right of following it. "However the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it": Note to *Williams v. Merle*, 25 Am. Dec. 611, 612. See also 15 East, 1st ed., 38; *George v. Claggett*, 2 Smith's Lead. Cas., pt. 1, p. 118, and notes; Code, sec. 2204.

The verdict, therefore, was contrary to the evidence. It is unnecessary to discuss the other grounds of the motion for a new trial.

Judgment reversed.

AGENCY. — Where one is conducting a business in his own name, but with the property and as the agent of an undisclosed principal, the principal cannot escape his liability for goods sold to the agent by a secret limitation on his authority: *Hubbard v. Tenbrook*, 124 Pa. St. 291.

AGENCY. — A concealed principal may sue upon a contract made by an agent in his own name, but the defendant will be entitled to the same equities against the principal as he would have been entitled to against the agent: *Foster v. Smith*, 2 Cold. 474; 88 Am. Dec. 604.

WHERE THE OWNER OF PROPERTY CLOTHES ANOTHER with apparent title or power of disposition, innocent purchasers from the latter will be protected, not upon the title or authority conveyed upon the vendor, but for the reason that the real owner has estopped himself by his conduct: *Velsion v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note 201, 202; note to *Williams v. Merle*, 25 Am. Dec. 611, 612.

WATKINS v. STATE.

[82 GEORGIA, 231.]

WITNESSES — IMPEACHMENT OF FOREIGN WITNESS. — The bad character of a witness who has removed to and resided in another state for eight years before the time of trial may be shown by proof of his character at the time he removed to such other state, although the impeaching witnesses do not know the character which he bore at the latter place.

J. W. Walters, C. W. Bass, and L. J. Blalock, for the plaintiff in error.

C. B. Hudson, solicitor-general, by B. P. Hollis and E. F. Hinton, for the state.

BLECKLEY, C. J. In November, 1887, Watkins was tried for the murder of Columbus Milner, who was assassinated in July, 1886. The evidence against him was chiefly circumstantial. One of the witnesses for the state was Mrs. Hollis, who resided in Florida. She testified to certain admissions made to her by Watkins in Florida. There can be no doubt of the vital materiality of her testimony. The jury having found the accused guilty, he made a motion for a new trial, on various grounds, one of which was that the court erred in not allowing him to prove by Suggs, Washman, and others, that they knew the general character of Mrs. Hollis when she lived in Georgia, and up to the time she moved to Florida, to wit, in 1879 or 1880; that it was bad, and from it they would not believe her on oath,—the court holding that she could be impeached on the ground of general bad character in no other way than by proving what her character now is. A new trial being denied, the case was brought here on writ of error, and this ground of motion was the one chiefly insisted upon in the argument before us.

The code, section 3873, declares: "To prove general bad character, the impeaching witness should be first asked as to his knowledge of the general character of his witness, and next as to what that character is, and lastly, he may be asked if, from that character, he would believe him on his oath." No doubt this provision is in substantial consonance with the law of England and of most of the states on the subject. No doubt, too, it contemplates primarily that present rather than past character is to be regarded. But on such a question, the past and present are so related that no complete severance between them can be made. Even those courts which seem

most strict in confining the evidence to the present time allow very considerable latitude: Compare *Rogers v. Lewis*, 19 Ind. 405; *City of Aurora v. Cobb*, 21 Id. 492; *Rucker v. Beaty*, 3 Id. 70; *Stratton v. State*, 45 Id. 468; *Louisville etc. R'y v. Richardson*, 66 Id. 43; 32 Am. Rep. 94; *Memphis Co. v. McCool*, 83 Ind. 392; 43 Am. Rep. 71; *Young v. Commonwealth*, 6 Bush, 312; *Manion v. Lambert*, 10 Id. 295; *Wood v. Mathews*, 73 Mo. 477. Some of the authorities lay it down that the range in time is subject to a sound discretion to be exercised by the trial judge: *Stratton v. State*, *supra*; *Buse v. Page*, 32 Minn. 111; *Holliday v. Cohen*, 34 Ark. 707.

As the law prescribes no definite limit in time, we think the discretion of the court must of necessity be exercised in every instance where the proposed evidence is not so remote as to preclude all difference of opinion. The discretion, however, must be soundly exercised on the facts and circumstances of the particular case. Here the character sought to be proved was the most reasonable one established in this state by the witness, and the one which she left behind her when she removed and settled herself in another jurisdiction. The process of our courts to enforce the attendance of witnesses would be of no avail as against residents of Florida, and it does not appear that any witness within our jurisdiction was acquainted with her character there. It may be said, therefore, that what was offered to be proved was all that could be proved touching the witness's character, there being no provision of law for taking depositions in criminal cases.

Even without this special fact of the witness's residence beyond the limits of the state, there is respectable, and we think sound, authority for proving the character which she had formed before removal. In *Sleeper v. Van Middlesworth*, 4 Denio, 431, it was ruled that the character of a witness might be impeached by persons in whose neighborhood he had lived until four years prior to the trial, though he had then removed to another place, fourteen miles from the neighborhood, where he had since resided, and the witnesses did not know of the character which he bore at the latter place. To the like effect, in substance, is *Rathbun v. Ross*, 46 Barb. 127. In *Graham v. Chrystal*, 2 Keyes, 21, the impeaching witnesses had knowledge of character eight or ten years prior to the trial, but none later. And see *Martin v. Martin*, 25 Ala. 201; *Kelly v. State*, 61 Id. 19; see also *Sims v. State*, 68 Ga. 486; *Turner v. State*, 70 Id. 766.

We think that the evidence tendered was admissible, and that the court erred in not granting a new trial.

Judgment reversed.

WITNESSES — IMPEACHMENT BY TESTIMONY AS TO CHARACTER. — Where the defendant in a state case is allowed to testify in his own behalf, his general character for truth and veracity may be impeached as that of any other witness: *McDonald v. Commonwealth*, 86 Ky. 10. But a party cannot impeach his own witness for truth and veracity, nor even introduce evidence to uphold the character of such witness, when it has not been attacked by the adverse party: *Saussey v. South Florida R. R. Co.*, 22 Fla. 327.

IMPEACHMENT OF THE CHARACTER OF WITNESS — PRACTICE. — Witness must first be asked touching his knowledge of the party's general reputation; then if he knows what such general reputation is, whether it is good or bad: *Kelly v. Highfield*, 15 Or. 277; and a witness who has shown his knowledge of the general reputation of another witness for truth and veracity in the vicinity in which he lives, and has testified that such reputation was bad, may be properly asked whether he would give such impeached witness full credit upon his oath in a court of justice: *State v. Johnson*, 40 Kan. 266. A witness by whom another witness is sought to be impeached as to his general character should be allowed to be cross-examined as to his capacity to testify as to the general character: *Clapp v. Engledow*, 72 Tex. 252. Evidence of the "reputation of a witness as a servant of the company" is wholly inadmissible to impeach a witness's character: *Saussey v. South Florida R. R. Co.*, 23 Fla. 327. One who states he has known a witness for twenty-seven years, and knows what his reputation is, and that it is good, is a proper witness of character, even though he has never heard witness's character discussed or talked about: *First Nat. Bank v. Wolf*, 79 Cal. 69; compare *Roberts v. Morrison*, 75 Iowa, 321.

IMPEACHMENT OF WITNESS — EVIDENCE OF CHARACTER. — Evidence impeaching the character and reputation of a witness at the time he left his former residence, about two months before the examination, is admissible: *Pape v. Wright*, 116 Ind. 502.

IMPEACHMENT OF WITNESSES — PRIOR STATEMENTS. — Former declarations of a witness, not contradictory to his present testimony, cannot be admitted to impeach him: *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74. To impeach a witness for former inconsistent statements, he must be personally interrogated, and the mere filing of his deposition is not sufficient: *Allison v. Coal Co.*, 87 Tenn. 60. When a witness has been impeached by prior contradictory statements before a magistrate, he cannot be sustained by proving that he made, just before the examination before such magistrate, statements in substance similar to those made upon the pending trial: *McKelton v. State*, 86 Ala. 594. So a witness may be impeached by former letters: *Anthony v. Jones*, 39 Kan. 529; as well as by former oral declarations and statements: *Hastings v. State*, 27 Tex. App. 273.

IMPEACHMENT OF WITNESSES — MISCELLANEOUS. — A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to cross-examine a witness as to such matters: *Sharon v. Sharon*, 79 Cal. 635. Specific acts of either good or bad faith are not admissible to affect the credibility of a witness: *Mathias v. O'Neill*, 94 Mo. 520. A witness cannot be impeached upon matters not relevant to the issue: *Gulf etc. Ry Co. v. Ocon*, 69 Tex. 730.

SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY v. HOLLAND.

[82 GEORGIA, 257.]

EVIDENCE — DECLARATIONS — RES GESTÆ — In an action against a railway company to recover damages for personal injury, declarations made by plaintiff half an hour after the accident, as to the manner of his leaving the train and receiving the injury, are inadmissible as part of the *res gestæ*.

WITNESSES — CROSS-EXAMINATION — WHOLE OF CONVERSATION ADMISSIBLE — Where a witness, on cross-examination, is asked as to a certain conversation, with a view to laying the foundation for his impeachment, he has a right under all circumstances to give the whole of the pertinent matter of such conversation in evidence.

EVIDENCE — PRESUMPTION IS THAT PARTIES to a suit are free from complicity in unlawful or improper conduct in obtaining evidence or otherwise, but when any question arises as to improper means employed to get up evidence, it should be left to the jury under all the facts and circumstances of the case.

PUNITIVE DAMAGES MAY BE RECOVERED, though not claimed *eo nomine*, where the declaration lays damages, alleges a tort, with circumstances that may well be considered as in aggravation.

Chisholm and Erwin, and S. T. Kingsbery, for the plaintiff in error.

W. M. Hammond, and Spence and Twitty, for the defendant in error.

BLECKLEY, C. J. 1. The plaintiff below, Holland, being a passenger upon the train, was carried past the station at which he wished to stop. Discovering the fact, he requested the conductor to let him off, and a vital question in the case was, whether he alighted safely and received his injury afterwards, by falling through a trestle on his way back to the station, or whether he fell through the trestle in alighting, by reason of being forced or pushed off at that point by the conductor. There is no doubt but that he was seriously injured by his fall, his leg being broken. No one witnessed the fall. He testified in his own behalf, and made a case of gross negligence against the company. The evidence of another witness was admitted, over objection, as to what the plaintiff said in giving an account of the manner of his leaving the train and receiving the injury. When these declarations were made, the plaintiff had pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to another, seated himself on the cross-ties, and cried for help. It was late at night. A person who heard his cry

reached him about half an hour after first hearing him. To this person the statement was made; and the question is, Was that statement a part of the *res gestæ*?

We think it was not. The code, section 3773, declares that "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*." It is manifest that the act by which the plaintiff was injured had completely terminated before his declarations were made, and that they were no accompaniment of the same. Were they so connected with it in time as to be free from all suspicion of device or afterthought? He had turned his attention from the act to measures looking to his own safety and comfort. He had certainly occupied his thoughts with something besides the facts and circumstances to which his declarations related. He had full opportunity, although no doubt under great suffering, to devise a story in his own interest, and there is no reason for concluding that he did not have capacity to take advantage of his opportunity. He was exposed to the temptation of fabricating a story, if he needed the aid of invention, and the exposure was under circumstances calculated to excite suspicion that his statement was, or might have been, referable to deliberation and afterthought rather than to spontaneous or instinctive utterance. This does not imply that he did fabricate, for he might not have done so; truth may have been with him, and invention unnecessary. But as his declarations did not accompany the act, they had to be so nearly connected therewith in time as to be free from all suspicion of device or afterthought: *Hall v. State*, 48 Ga. 607. If subject to suspicion at all, they were not admissible, although in the particular case the suspicion might be erroneous. In *Augusta Factory v. Barnes*, 72 Id. 218, 53 Am. Rep. 838, the injured person was a child fourteen years old, and she died from the injury. Her declarations, made half an hour after the injury was received, were admitted in evidence, upon the ground that they were free from suspicion, this court saying: "It is scarcely credible that this little girl, while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or for any other ulterior purpose." In considering that case afterwards in *Augusta etc. R. R. Co. v. Randall*, 79 Ga. 311, in which latter case the declarations

of a mature woman, not more remote in time, were held inadmissible, the court said: "That case must rest alone upon its own peculiar facts, and will not be extended beyond them. . . . The proximity of time in which declarations are made to the main transaction is not the only test of their admissibility in evidence, but they must also be free from all suspicion of device or afterthought." It is obvious that upon this requisite of freedom from suspicion, the age and discretion of the speaker must be of very considerable importance. We think the doctrine recognized generally by courts, others as well as our own, would require the exclusion of the evidence in this case. A somewhat thorough discussion of the subject will be found in the opinion by Earle, J., in *Waldele v. New York etc. R. R. Co.*, 95 N. Y. 274, the facts of which case were quite as favorable for the admission of the evidence as are those of the present case, and it was ruled inadmissible. An excellent chapter on the topic will be found in Wood's *Practive Evidence*, pages 413-480. And see Meacham on Agency, sec. 715. Inasmuch as the evidence of the plaintiff and that of the conductor differed to the degree of direct antagonism upon the principal facts in issue, any legal evidence may have turned the scale; and the declarations of the plaintiff being, as we have seen, inadmissible, we think a new trial should be had. For this reason, the judgment denying a new trial is reversed.

The witness Branch, on cross-examination, was interrogated as to conversation in the presence of Collins, and as to conversation addressed to Collins. This was with a view to laying the foundation for impeaching him by the testimony of Collins. His answers, without the explanation which he was allowed to superadd, would not show that he might have been misunderstood by Collins as to the former conversation. With the explanation, the answers show plainly that Hitt did the talking or the most of it, and that Branch responded by nodding his head several times, without expressing himself in words. What Hitt said was pertinent to the subject-matter to which the cross-examination related, and the nodding of the head by the witness was perhaps ambiguous, meaning either that he understood what Hitt said, or that he assented to some of it as representing the truth of the case. The latter construction might have been put upon it by Collins, and the jury would not have known whether this was correct or not had not all the facts and circumstances of the conversation been brought to light as the witness detailed them. Indeed, with-

out some of the explanation, they would not have even known that Branch expressed himself in this way at all. Whether Hitt was an agent of the company to talk as he did is quite beside the question; for the company sought to affect the witness by the part he, the witness, took, or was supposed to have taken, in that conversation, no matter who or what the other interlocutor was. He had a right to show what the part attributable to himself really was, and in order to do so, under the peculiar circumstances it was necessary to detail all or much of what Hitt said. The general rule as to bringing out the whole of the pertinent matter of a conversation where a part of it is touched upon is applicable to the present case with peculiar force, for here the conversation was conducted on one side by words, and on the other chiefly by signs alone.

3. Hitt talked very improperly, and with an evident purpose to corrupt his host, Mr. Branch, as a witness. Collins was with him to hear what was said, and both, it seems, were sent by Bush, Esq., one of the company's counsel, to get up evidence to be used in the case. It does not appear in express terms that the company or that Bush directed or authorized the use of any improper means in the business of getting up evidence, but there can be no doubt that to obtain evidence and prepare for trial is within the scope of the powers of an attorney employed in the defense of a pending case. If Bush himself had used the means to suborn evidence which Hitt used, the fact of his so doing would, it seems to us, have been admissible in evidence; and if so, we see not why Hitt's conduct under Bush should not be admissible. The court charged fully and fairly as to the presumption that the company was free from complicity in the unlawful and improper conduct, but left the question to the jury as to how the matter really was, both in respect to the agency of Hitt and his authority from the company to conduct himself towards the witness as he did. There was no proof from Bush or any other witness that Hitt had transcended his authority, and this, together with all the facts and circumstances, could be considered by the jury. The evidence warranted the reference of the whole matter to the jury for their appraisal of its import and value as a factor in the general case.

4. The point made that punitive damages could not be recovered, because they were not claimed *eo nomine*, is wholly without merit. The declaration lays damages at ten thousand dollars, and alleges a tort with circumstances that may well

be considered as an aggravation. The code, section 3066, declares: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." It certainly cannot be necessary for the plaintiff to set out in his declaration, in so many words, that he claims some or all of his damages as punitive. All he has to do is to make a case by his pleading, and evidence which will entitle him to such damages in addition to those actually sustained.

We find no error in the record save as indicated in the first division of this opinion.

Judgment reversed.

EVIDENCE — RES GESTÆ. — As to what declarations are admissible as *res gestæ*: *Erie etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and cases cited in note.

PRESUMPTIONS. — A PERSON IS ALWAYS PRESUMED TO BE INNOCENT until he is proven guilty of any criminal conduct: *State v. Smith*, 32 Me. 369; 54 Am. Dec. 578.

DE VAUGHN v. HOWELL.

[32 GEORGIA, 236.]

LANDLORD AND TENANT — RIGHT TO RESERVE TITLE TO CROPS UNTIL RENT IS PAID. — A landlord when making a lease for a term of years may reserve the title to crops grown on the land until his yearly rent and advances are paid.

LANDLORD AND TENANT. — WHERE THE LANDLORD RESERVES the title to the crops grown on the leased land until his rent and advances are paid, and during the term the tenant dies, whereupon the landlord takes possession and gathers the crop, the widow of the tenant is entitled to the balance of the proceeds of the sale thereof, after the landlord's rents and advances are paid for that year.

R. F. Lyon, J. B. Holmes, and J. M. Du Pree, for the plaintiff in error.

E. A. Hawkins and J. W. Haygood, contra.

SIMMONS, J. J. J. Howell, in the year 1884, entered into a written contract with De Vaughn for the rent of a certain plantation and mules for that year, whereby he agreed to pay said De Vaughn two thousand six hundred pounds of lint-cotton. He made other agreements in said contract, as to repairing fences and attending to stock, which need not be

mentioned here. De Vaughn agreed to furnish a certain amount of supplies. It was also further agreed that Howell was to have said land and mules for the years 1885 and 1886, at the same terms, "provided Howell paid said De Vaughn for rent and all advances for each year." In order to secure De Vaughn in the payment of the rent and advances, the contract says: "I hereby sell, assign, and convey unto said De Vaughn all my interest in and to said crop of all sorts made by me and my tenants, and consent that the title of the same shall vest and remain in said De Vaughn or assigns until he shall have been fully paid for all articles I may be due him for." Howell occupied the farm for the years 1884 and 1885, and up to June, 1886, when he died, before the crop had matured. He left his widow upon the farm, who undertook to carry it on, but failed; whereupon De Vaughn took possession, and cultivated and gathered the crop. The widow applied for a year's support, and the crop was set aside to her by the ordinary. She brought trover against De Vaughn to recover possession of the crop. Upon the trial of the case, under the charge of the court, the jury returned a verdict in her favor. De Vaughn moved for a new trial, upon the several grounds stated therein, which was overruled by the court, and he excepted.

The ground relied upon here by counsel for the plaintiff in error for a reversal of the judgment of the court below is as follows: The court erred in charging the jury that it was his duty to construe the contract mentioned above under which De Vaughn claimed title to the crops in dispute, and in so far as this contract, made in 1884, undertook to pass title to De Vaughn to the crops of 1886, it was void and of no effect; that it was contrary to law to permit a title to be maintained to the crop made in 1886 by such contract made in 1884, and that De Vaughn could not maintain title to the crops under such contract.

We think the exception to this charge is well founded. While it is true, as a general rule, that things not *in esse* cannot be sold, we do not think that that rule applies to a case of this character. Here was a landlord who made a rent contract with his tenant, and the tenant not only agreed to sell the crop, but went further, and agreed that the title to all the crops made on the farm should remain in the landlord until the landlord was fully paid for his rent and all advances. We see no reason why a landlord, when he rents his farm,

cannot reserve in the rent contract the title to the crops grown thereon until his rent and advances are paid. It is simply a reservation of the fruits of his own land. It is not like an owner of land selling his crop before it is planted, or a tenant mortgaging his crop before it is planted. This direct question has never been before this court before, but it seems to have arisen in other states. In the case of *Smith v. Atkins*, 18 Vt. 465, Redfield, J., in discussing this question, says: "It is without doubt true that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory; that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors. The leasing of land or domestic animals, or delivering to another property to trade with,—the lessee having still an interest in the thing, but the general property remaining in the lessor,—is not a sale of things not *in esse*, nor is it so to be esteemed, even where the lessor retains a lien for his rent upon the product of the land, or the animals."

In the case of *Bellows v. Wells*, 36 Vt. 601, 602, Poland, C. J., says: "It has been repeatedly decided in this state that the lessor of land may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and that such provision is valid, not only between the parties, but as to third persons also. . . . The reasoning upon which our decisions go is, that the owner of the land, being also the owner of the fruits or products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself or the products grown from it as he chooses, instead of parting with the full right. The principle is the same as that upon which conditional sales of personal property are upheld."

In the case of *Andrew v. Newcomb*, 32 N. Y. 417, Denio, C. J., says: "The owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest": See also *Heald v. Builders' Fire Ins. Co.*, 111 Mass. 38; *Butt v. Elliott*, 19 Wall. 544; *Wentworth and Osborn v. Miller and Lux*, 53 Cal. 9; *Howell v. Foster*, 65 Id. 169; *Lewis v. Lyman*, 22 Pick. 437; *Ponder v. Rhea*, 32 Ark. 435; Am. & Eng. Ency. of Law, note 896. These cases, we think, fully sustain our position in this case. We think the

principle ruled is sound and fair, both to the landlord and the tenant. It follows, therefore, that the contract made between De Vaughn and Howell was a valid and binding contract, and that the title to the crop vested and remained in De Vaughn until he was paid his rent and the advances made by him for the year 1886.

2. It may be argued, however, that this principle would have applied to the year 1884, when the contract was made, but could not apply to the crops made in 1886, because the contract was made more than two years before that time. We do not see any difficulty in that suggestion. The contract was absolute for the year 1884, and conditional for the years 1885 and 1886. It was stipulated in the contract that the same terms should apply for these years as to 1884, if the rent was paid. We presume that the rent was paid for 1884 and 1885, as the evidence shows that Howell was still on the farm up to June, 1886, when he died. He recognized the contract as binding upon him for that year, as the evidence in the record shows. And, in our opinion, if he had paid his rent for the two previous years, it was as binding in the year 1886 as it was in the year 1884. The case of *Almand & Co. v. Scott*, 80 Ga. 95, 12 Am. St. Rep. 241, was different in its facts from this case. In this case there is a written contract between the landlord and tenant, in which the crops were sold to the landlord by the tenant, and the title thereto reserved by the landlord. In Almand's case the contract was for a part of the crop, and was a verbal one between him and his tenant, and not in writing, as required by the code, section 2289. That section is as follows: "When the rent agreed to be paid is a part of the crop, such portion shall not be liable to be levied on by any process for debt against the tenant; provided the contract is in writing and the rent does not exceed one half of the crop." This section should have been cited in Almand's case.

3. When De Vaughn is fully paid for his rent and advances, and for the necessary expense in cultivating and gathering the growing crop for that year, if there is a balance left, we think that Mrs. Howell would be entitled to it. It will be for the jury to say on the next trial what were the necessary expenses incurred by De Vaughn in the cultivation and gathering of that crop. She would also be entitled, under the evidence in this record, to recover the horse and its reasonable hire.

Judgment reversed.

RIGHT OF LANDLORD TO RESERVE TITLE TO OR LIEN ON CROPS TO BE RAISED BY HIS TENANT. — Independently of the landlord's lien for each year's rent given by statute in many of the states, there seems to be no question as to his right to secure, by special covenant in the lease, the title to or a lien upon the crops to be grown by his tenant as security for the rent, or for rent and advances made by him, and such reservation may be made by mortgage, and may be contained either in the lease or in a separate instrument. Thus in *Booker v. Jones*, 55 Ala. 266, it is held that where lands are leased for a term of years, to commence in future, and the lessee at the same time executes a mortgage to the lessor conveying the crops to be grown each year as security for the rent, the lease and mortgage are to be construed together as parts of one and the same instrument, and thus construed they constitute a reservation of the title to the crops to the lessor and mortgagee until the rent is paid. In this case it is said, citing *Rhinhart v. Olive*, 5 Watts & S. 157, that "rent may be reserved, payable in kind, in the products of the soil, and if so reserved, whether title remains in the lessor, or passes to the lessee, is determinable by the words of the stipulation in the lease, and not on the inquiry whether the products exist actually or potentially, so as to be the subject of grant or sale." The lease may be so expressed that the title to the crops will follow the term until their severance and delivery to the lessor. So in *Moulton v. Robinson*, 27 N. H. 550, it is held that where lands are leased, reserving part of the crop in lieu of rent, the contract takes effect by way of reservation, and the crop thus reserved remains the property of the landlord. A review of the cases on the subject shows that none of them controvert the right of the landlord to provide in the lease that produce or crops grown on the land are to be and to remain the property of the lessor until the rent is paid; and in Vermont it has been repeatedly decided that the landlord may stipulate in the lease that the crops grown on the premises by the lessee shall remain the property of the lessor until the rent shall be paid, and that such a provision is valid, not only as between the parties, but as to third persons: *Smith v. Atkins*, 18 Vt. 461; *Paris v. Vail*, 18 Id. 277; *Briggs v. Oaks*, 26 Id. 138; *Gray v. Stevens*, 28 Id. 1; 65 Am. Dec. 216; *Edson v. Colburn*, 28 Vt. 637; *Baxter v. Bush*, 29 Id. 465; 70 Am. Dec. 429; *Bellows v. Wells*, 36 Vt. 599; *Cooper v. Cole*, 38 Id. 191; and the same principle is in effect held in *Lewis v. Lyman*, 22 Pick. 437. So in *Heald v. Builders' etc. Fire Ins. Co.*, 111 Mass. 38, where the lessees of a farm agreed in the lease that they would feed the stock on the farm with the hay which should grow thereon, and that they would not sell or suffer to be carried away from such farm any of such hay, and after making the lease they assigned to a third person, it was held that no title passed to the hay grown, and that he had no insurable interest therein. In California, it has been held that where the lessee of a farm agrees to pay the lessor a part of the crop as rent, and to give him possession of the whole crop until the rent is paid, a sale of the crop by the lessee does not pass the title as against the lessor: *Wentworth v. Miller*, 53 Cal. 9. Nor is such crop subject to attachment by a creditor of the tenant while the rent remains unpaid: *Howell v. Foster*, 65 Id. 169.

In *Fox, Bawn, & Co. v. McKinney*, 9 Or. 493, the doctrine upon which this rule is maintained is said to be, that the owner of the land, being also the owner of the fruits, or of the products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself, or of the products to be grown from it, as he chooses, instead of parting with the full right. In such case, the property in the products of the farm is in the landlord, and not in the tenant, until the performance of the

condition upon which the ownership of the crop shall be changed; and where the parties intend by their agreement that the landlord shall be the owner and have control of the crop until the rent is paid, the intention of the parties furnishes the true rule of construction. In the case of *McCombs v. Beeler*, 3 Hun, 343, it is said: "It was entirely competent for the defendant and his landlord to agree that the hay to be raised on the demised premises should be and remain the property of the defendant until the rent should be paid, and the conditions of the case be satisfied by the tenant. Instead of the tenant's mortgaging the crops to be grown as security for the rent, he may agree that the crop shall be the landlord's until the rent is paid. In the one case, the agreement is that the crop shall be the landlord's if the tenant does not pay the rent; in the other case, it shall be the tenant's property until he does pay it." So in *Andrew v. Newcomb*, 32 N. Y. 417, it is held that the owner of land may contract for its cultivation by a cropper, and provide that the property in the crops to be raised shall vest in himself. Under such a contract, the crops vest in the owner of the land as soon as they come into existence. The same rule is maintained in *Tanner v. Mills*, 48 Id. 602; *Cinderman v. Smith*, 41 Barb. 404; *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480. And in *Van Hoover v. Cary*, 34 Barb. 9, it is said that, "taking the whole contract together, it was evidently the design that the property in the products of the farm should be in the plaintiff, and not in the lessee, until the payment of the rent. The contract, as thus interpreted, is not illegal nor unreasonable." Still it has been held that where the lease contains an agreement that the landlord shall have a lien on the growing crops for his rent, but he has neither filed his lease nor taken possession, his right must be postponed to that of a *bona fide* mortgagee of such crop: *Thomas v. Bacon*, 34 Hun, 88. So under the lease of a farm with the stock on it for one year, with the provision that the stock and all the products of the farm were to be the property of the landlord until all the obligations of the tenant under the contract were discharged, and, before they were discharged, a quantity of hay cut by the tenant, and stored in the barn on the premises, was attached as the property of the tenant, it was held that the property in the hay was in the landlord, and that his possession was sufficient to maintain trespass for the taking: *Griswold v. Cook*, 46 Conn. 198.

Sometimes the reservation of rent is in the form of a stipulation in the lease that the lessor shall have a lien for his rent on all the personal property then on the premises as well as on the crops, and then the lien is to be enforced, in case of non-payment, in the same manner as in cases of chattel mortgages: *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480; *McLean v. Klein*, 3 Dill. 113; *Wisner v. Ocumpaugh*, 71 N. Y. 113. It has been held that such a reservation for rent must be reasonably certain in its terms, and therefore a provision in a lease stipulating that the landlord shall have a lien by way of mortgage upon all goods or other personal property which may be put upon the demised premises is void for uncertainty, since it does not identify any particular property, nor furnish data from which it can be known to what the lien really applies: *Buskirk v. Cleveland*, 41 Barb. 610. In *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644, a lease of a farm contained a clause giving the lessor "a lien, as security for the payment of the rent aforesaid, on all goods, implements, stock, fixtures, tools, and other personal property which may be put on said premises, and said lien to be enforced, on the non-payment of the rent," by taking and selling as in case of a chattel mortgage; and in an action for the conversion of hay and other farm produce, and

the stock on the farm taken and sold by an agent of the landlord, after default in the payment of rent, it was held that the action was not maintainable; that the clause was, in effect, a chattel mortgage, which, as against the lessee, so far as it attempted to create a lien upon property not in existence or not then acquired, while in law it might not pass title, still gave the landlord a right to seize the property, and by such seizure the title passed, and that in equity it transferred the beneficial interest without the intervention of any new act, which attached immediately upon the coming into existence or the acquisition of the property; and it was also held that the reservation clause covered crops subsequently raised upon the farm. To the same effect are *Metcalf v. Foodick*, 23 Ohio St. 114, *Dalton v. Landaka*, 27 Mich. 529, and *Leland v. Collier*, 34 Id. 424. A right to enforce such a stipulation passes to the grantee of the lessor, and a verbal agreement between them that the rent shall be paid to the lessor will not enable him to enforce the stipulation: *Hansen v. Prince*, 45 Id. 579. That the assignee of the landlord has as much right to enforce the lien as if it were held by the landlord is held in *Benson v. Gottheimer*, 75 Ga. 642. A mortgage clause in a contract of lease cannot operate as a mortgage before the crop to which it relates is in potential existence; but when the crop is grown, the lien attaches, and binds it effectually from that time: *Butt v. Bllett*, 19 Wall. 544; and such lien may be enforced against the mortgagor and those holding under him with notice: *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644.

Where land is leased for the purpose of raising a crop on it, the landlord to furnish part of the team, provender, and supplies, and after a certain part of the crop had been reserved for rent, and certain debts due the landlord from the tenant were paid, the latter was to have what remained, it was held that the tenant had no interest in the crop, and could not sell nor mortgage it: *Ponder v. Rhea*, 32 Ark. 435.

A landlord may, in his lease for one year, provide for a lien on the crops raised that year, to attach thereto for the payment of the rent of that and the preceding year; and while such lien is good as between the parties to it, still the lien for the preceding year is not good as against a purchaser from the tenant without notice: *Prettyman v. Unland*, 77 Ill. 206.

LAMAR v. PEARRE.

[82 GEORGIA, 354.]

TRUSTS AND TRUSTEES. — Where a trust is created by will in favor of the testator's daughter, and her children then or thereafter born, the daughter to have the possession, use, profits, enjoyment, and control of the property during her life, then to descend equally to her children and grandchildren, the appointment of a new trustee for the daughter alone, upon the petition of herself and the first trustee, but without the consent of the remaindermen, will not vest in the trustee so appointed the legal title to the estate, so that he can convey it in fee without the consent of the remaindermen. He has only a legal estate proportional with the daughter's estate for life, and the first trustee is still clothed with his executory trust for the remaindermen.

TRUSTS AND TRUSTEES — STATUTE OF LIMITATIONS. — Where, under a trust for life, with remainder over, the trustee has the legal title to the estate, commensurate only with the life estate of the beneficiary, the trustee and such beneficiary cannot convey the estate in fee without the consent of the remaindermen, and if such conveyance is attempted, the statute of limitations will not begin to run against the remaindermen until the death of the tenant for life.

Dessau and Bartlett, and McNeill and Levy, for the plaintiffs.

W. M. & M. P. Reese, for the defendant.

BLECKLEY, C. J. The will of Gazaway Davis (who died in 1845), reciting that the testator was desirous to place his daughter, Mary Ann Lamar, wife of Henry G. Lamar, and the children she then had and might thereafter have, free from the burden of want, by securing to her and them property, both real and personal, constituted Gazaway D. Lamar trustee for her and her children, "as herein provided." It then proceeded to give and devise to Gazaway D. Lamar slaves, live-stock, household and kitchen furniture, farming utensils, corn, wheat, and other personalty, and the plantation in Columbia County, now in dispute, together with other real estate, this clause of the will concluding as follows: "To have and to hold the aforesaid property as trustee for my aforesaid daughter, Mary Ann Lamar, and the children she now has or may hereafter have, for and during her natural life, the same, together with the increase and profits, to remain in her possession, use, occupation, enjoyment, and control while living, and after her death, the same to be equally divided, share and share alike, between her surviving children and her grandchild or children. Should any of her children have departed this life leaving a child or children, in such event said grandchild or children is or are to receive the respective portions which his, her, or their father or mother would have received were said father or mother still living; to have and to hold the same to them and their heirs forever."

The will bore date in 1843. How many children Mrs. Lamar had at that time, or at the death of her father, does not appear. She died in May, 1882, leaving surviving her six children, nine having previously died, one of whom left a child. This action of ejectment was brought February 3, 1885, by John Doe upon the demise of four of the surviving children, the grandchild left by a deceased son, and seven other grandchildren, the children of a daughter who died subsequently to the death of Mrs. Lamar; the defendants being Richard Roe

as casual ejector, and B. E. Pearre as tenant in possession. The premises sought to be recovered are the plantation in Columbia County devised by the will.

The defendant claimed title both by conveyance and by prescription. His muniments of title consisted of the following documents:—

1. A petition to Hon. Henry G. Lamar, judge of the superior court of the Macon circuit, exercising jurisdiction in chancery. It was signed by Mary Ann Lamar and Gazaway D. Lamar, and purports on its face to be the joint petition of her and of him as her trustee. It represented that he was appointed her trustee by the last will and testament of Gazaway Davis, as well as by an order of the superior court of Bibb County, to both of which it asked leave to refer without setting them forth. It represented that he had up to that time faithfully performed the duties of said trusteeship, that he had removed out of the county of Bibb, and could not therefore continue to perform such duties without great inconvenience to himself as well as to the *cestuis que trust*, that he held lands in common with her, and wished to convey a more perfect title to her by way of trusteeship than she then had. For these reasons it prayed for an order changing the trusteeship held by him, and for the appointment of John Lamar, or some other fit and proper person, as trustee for her, and in lieu and instead of Gazaway D., and that the latter be discharged from any further duty connected with said trusteeship. The petition is without date, and annexed to it is a certificate signed by John Lamar, that he was willing to receive the appointment of the trusteeship referred to in the petition, and would accept and faithfully perform the duties thereof if appointed. Then comes an order in chambers, dated July 12, 1858, signed by Henry G. Lamar, judge of the superior court of the Macon circuit, reciting that upon the petition of Mary Ann Lamar and Gazaway D. Lamar, her trustee, it appearing that Gazaway D. having been appointed the trustee by the last will and testament of Gazaway Davis, as well as by an order from this court, and that it is for the best interest of the estate held by him in trust for her that said trusteeship should be changed, and some other fit and proper person appointed instead of him, and it appearing from the certificate of John Lamar that he is willing to accept the appointment, and ordering that Gazaway D. Lamar be discharged from the duties of said trusteeship, and that John Lamar be appointed the trustee for her in

his stead, and that this order be entered on the minutes of Bibb superior court.

2. A petition signed "John Lamar, trustee for Mary Ann Lamar," addressed the same as the preceding petition, and on its face purporting to be the petition of John Lamar, trustee for Mary Ann Lamar, and representing that on the 12th of July, 1858, he was appointed trustee for her in lieu and instead of Gazaway D. Lamar, who had been appointed to said trusteeship by the last will and testament of Gazaway Davis, and who resigned said trusteeship on the day aforesaid; that John Lamar now holds, as trustee aforesaid, a large tract of land in the county of Columbia, besides lands in the county of Baker, and a number of negroes; that by reason of the unproductiveness of the Columbia land, and the superior advantages and convenience of the Baker land, both to the trustee and the *cestui que trust*, it would be greatly to the benefit and interest of the trust estate that the Columbia land should be sold, and the negroes thereon removed to the county of Baker; that the trust estate is encumbered with a debt, to discharge which it will become necessary to sell some portion of said estate. Therefore he prays an order allowing him to sell said lands in Columbia County, and after discharging the debt with the proceeds, that he may invest the balance in such property as to him may seem best for the interest of said trust estate. This was followed by a certificate signed by Mrs. Lamar, in which she declares that she joins in the petition, and is willing that the prayer of the petitioner should be granted. Next comes an order headed "Bibb superior court, November term, 1858," dated at the bottom, 20th November, 1858, and signed officially by Judge Lamar. The order is in these terms: "It appearing to the court by the petition of John Lamar that he is trustee for Mary Ann Lamar, and that he now holds, as trustee aforesaid, two large tracts of land, one in the county of Columbia, and the other in the county of Baker, in the state of Georgia, and a number of negroes, and that it is greatly to the interest of said trust estate that said land in said county of Columbia and state of Georgia be sold, it is therefore ordered by the court that said John Lamar is hereby authorized and allowed to sell the said land in the county of Columbia, and that out of the proceeds thereof, after paying the debt alluded to in his petition, he purchase such other property as to him may seem best for the interest of said trust estate. It is further ordered that this order be placed on the minutes of Bibb superior court."

3. A deed from John Lamar, trustee for Mary Ann Lamar, to the defendant, B. E. Pearre, dated December 9, 1858, and conveying the premises in fee-simple, with warranty of title, the consideration paid being \$15,450. There was evidence at the trial indicating that the defendant entered under this deed, claiming the land as his own, made improvements costing many thousand dollars, and has continued to hold and claim adversely ever since. As to the character, continuity, and length of his possession, there was no dispute.

Both trustees died before the action was brought. John died in the lifetime of his mother; Gazaway D. after her death. Neither of them left issue. The presiding judge, to whom was referred the case as a whole,—the facts as well as the law,—construed the will of Gazaway Davis as conveying the legal title in fee to the trustee, and held that a good prescriptive title was shown in the defendant; and judgment for the defendant was rendered accordingly.

After protracted and laborious study of the case, we have arrived at the conclusion that the nice and doubtful question as to whether Gazaway D. Lamar, the original trustee, took the legal estate in fee or only an estate for and during the life of his mother, Mrs. Lamar, need not be decided.

1. Whether the court below was right or wrong in holding that the legal fee passed by the will to the first trustee, we are confident that it never passed to the second, the one to whom leave to sell was granted, and who executed the deed to the defendant. John Lamar was appointed by the order of July 12, 1858, trustee for Mrs. Lamar only. There is no hint or intimation in either of the petitions in either of the orders, or in the deed, that he was or was to be trustee for the children, or that he acted or was to act in that capacity. Although Judge Lamar was the father of both trustees, as well as the husband of the *cestui que trust* for life, he was perfectly competent, with the consent (Code, sec. 205) of these three persons, all of whom did consent, to substitute, by an order at chambers, one of the sons for the other as trustee for Mrs. Lamar; but without the additional consent of all the other beneficiaries of the trust, given by themselves if competent to consent, or by some proper representative if they were not competent, he could not lawfully remove one trustee and appoint another as to the estate in remainder: Acts of 1853–54, p. 59. Judged by its own terms, and restricted to what these terms express, the order in ques-

tion was perfectly valid. To hold it free from legal infirmity, it is requisite either to construe the trust as limited by the will in duration to the life of Mrs. Lamar, or if that cannot be done, to adhere to the terms of the order. Where two constructions are open to our choice, it is our duty, in favor of jurisdiction to pass the order and the proper exercise of the same, to adopt that construction which treats the order as completely legal, rather than that which would hold it partially illegal, and to that extent void or voidable. Were it conceded that the trustee himself could represent the remaindermen in procuring an order of sale, that concession would not involve the recognition of any power on his part to represent them in obtaining an order for his own abdication of the trust, and to have a successor appointed. The act of 1854 provided for removal and appointment at chambers only in cases in which all parties in interest were represented and consenting. There can be no doubt that the terms "parties in interest" include living persons named as objects of the testator's bounty, though described as a class, and though the rights of individuals of the class might be only contingent.

The record does not disclose how many of the children of Mrs. Lamar (in addition to the two trustees) had attained to years of discretion at the time the order was granted; but it is certain that one of them at least (the plaintiff, Mrs. Thornton) had so done, for it appears that she was married in the year 1849. Had the proceeding been under the act of 1854, as modified by the code, section 2320, her consent would have been essential; but as the law stood when this transaction took place, not only she, but all who had an interest, whether adults or minors, had to be represented and consenting. There is nothing to suggest that any one represented the remaindermen unless the trustee did it; and surely there is no need for argument to show that a trustee, when in the act of surrendering his office to another, represents nobody but himself. Suppose he were called to account by the remaindermen for some omission of duty as their trustee, occurring after this *ex parte* discharge, could he defend by setting up that discharge as terminating his trust relation to them? Certainly not. If he ever was their trustee, with any active duty to perform in their behalf, he was none the less so after than before he resigned as trustee for Mrs. Lamar.

To hold, therefore, that Judge Lamar intended the trust devolving on the new trustee to be broader than the order

expresses would be to impute to him the official oversight of granting at chambers the prayer of an *ex parte* petition without having all the parties at interest represented. Rather than make this imputation, we think it preferable, and much more safe, to confine the order as he himself confined it, and hold that the appointment of John Lamar was as trustee for Mrs. Lamar, and her only, leaving any trust title there may have been originally in Gazaway D. in behalf of children and grandchildren to abide in him after the order as before. Supposing the trust of the will to have included both the life estate and the remainder, it would have been competent for the testator to constitute, by the will, one trustee to take the former estate, and another the latter estate. Judge Lamar, as chancellor, representing the testator, made this severance; and after the severance was thus made, the two trustees occupied the position they would have occupied from the beginning had the testator done as we have suggested. It will be noticed that, as trustee for the children, Gazaway D. Lamar had no power of possession or management during the lifetime of Mrs. Lamar, the will declaring that the property, "together with the increase and profits," was "to remain in her possession, use, occupation, enjoyment, and control while living." If he had anything whatever to do in behalf of the children, it was not until after her death, and then only to cause to be made a division in terms of the will. It is not quite certain that even this much devolved upon him. As the use, enjoyment, and profits were all given to Mrs. Lamar whilst she lived, the children had no share in them, except what she chose to allow. For any participation in these, the testator made the children dependent upon her bounty. He gave her the means to provide for them during her life, instead of directly making the provision himself.

2. If what we have said be sound, it is certain that the defendant acquired no title to the property by the deed (although it purports to convey in fee-simple) of John Lamar, as trustee of Mary Ann Lamar, for a longer period than the duration of her life. Being her trustee alone, and her interest being limited to a life estate, he never had or acquired any larger interest, so as to transmit the same. Furthermore, when the order of sale was obtained, the remaindermen were not parties to the proceeding, nor before the court, either by themselves or their trustee, John Lamar not being trustee for them.

3. With reference to prescription, the case is equally clear. Mrs. Lamar and her trustee could without, and certainly with, the order granted by Judge Lamar in November, 1858, sell and convey the property during her life. As by the terms of the will she was entitled to the possession, use, occupation, enjoyment, and control of it, she and her trustee, the chancellor concurring, could undoubtedly substitute a purchaser in these same rights. And as in Georgia no forfeiture attends a conveyance by a tenant for life of a larger estate than he owns, there could have been no entry during the lifetime of Mrs. Lamar upon the purchaser, either by the remaindermen or by Gazaway D. Lamar as their trustee. Had he or they brought an action against this defendant to recover the possession of this property pending the life of Mrs. Lamar, there is no possible doubt that the action must have failed. Mr. Pearre could have defended the same as effectually as Mrs. Lamar could have defended a like action against her, had there been no sale and she had remained personally in possession. Statutory prescription proceeds upon the assumption that there is laches in not suing; but here there was no laches on the part of any one during the lifetime of Mrs. Lamar, for any suit that could have been brought by any person whatsoever must have been utterly fruitless. It cannot be a sound theory of law to treat the statutory prescription as running in favor of a possession which, for the time being, was secure against any action that could possibly have been brought; and such was the possession of Mr. Pearre up to the time of Mrs. Lamar's death. And this suit was brought in due time thereafter.

We confine our discussion and decision to matters which must have been considered by the court below in reaching the conclusion that the defendant had a good title by prescription. Other matters discussed in the brief of counsel, but which the court below, under its ruling on prescription, had no occasion to adjudicate, we leave to be dealt with upon a new trial. It is best that these elements be canvassed over, with a clear understanding that the pressure of the case, as to the ultimate result, is upon them, with no complication with the element of prescription.

There ought to be another trial, and it is so ordered. Judgment reversed.

STATUTE OF LIMITATIONS — REMAINDERMEN. — The statute of limitations does not begin to run against remaindermen or reversioners until the death of the tenant of the supporting estate: See note to *Allen v. De Groodt*, *post*, p. 628.

GRIGGS v. SWIFT.

[82 GEORGIA, 802.]

MASTER AND SERVANT — TERMINATION OF EMPLOYMENT BY DEATH. — Under a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employee, on the other, upon the life of the partnership, provided the death in either case is not voluntary.

MASTER AND SERVANT — TERMINATION OF EMPLOYMENT BY ACT OF GOD. — Where a contract for personal yearly services to a partnership becomes impossible of performance by reason of the death of one of the partners, which works a dissolution of the partnership, the servant has no right to recover upon the same against the surviving partner for services never actually rendered.

Thomas W. Grimes, and Peabody, Brannon, and Hatcher, for the plaintiff.

McNeill and Levy, for the defendant.

BLECKLEY, C. J. The hiring was by the partnership, for the term of one year from September 1, 1886, at fifty dollars per month besides board. One of the two partners of which the firm consisted died in November, and the survivor discharged the plaintiff on the 1st of January. The plaintiff could obtain no other employment until the following July; and after the year expired for which he was hired by the partnership, he brought this action, claiming the agreed compensation from the 1st of January, the time of his discharge, up to the date in July, when he procured other employment, and his expenses for board during the same period.

As there is no trace in the evidence that the partnership was, by the terms of its creation, to subsist or continue after the death of one of its members, such death wrought a dissolution, and forever terminated the partnership: Code, secs. 1892, 1894. One of the parties, therefore, to the contract of hiring became extinct by the act of God.

The code declares (sec. 2871) that if performance is impossible, and becomes so by the act of God, such impossibility is itself equivalent to performance. There being no one after the partnership went out of existence to receive the personal services which the plaintiff had contracted to render as inspector of farms and collector for the partnership, the further execution of the contract was as much impossible as if the plaintiff himself had died before or after a dissolution of the

firm had taken place. The survivor transacted no new business on the partnership account, but confined operations to closing up the firm affairs. The classification of every contract must depend upon a rational interpretation of the intention of the parties: Code, sec. 2721. From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employee, and on the other, upon the life of the partnership, provided the death in either case was not voluntary. To this effect is the text of Wood on Master and Servant, section 163: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that a servant is absolved therefrom, but if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom, but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. . . . So if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm; and this is so even though other persons are taken into the firm. The test is, whether the firm is dissolved. So long as it exists, the contract is in force, but when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties."

Mr. Wood's reference is to two Scotch cases which we have not seen, but the rule he deduces from them is so reasonable that we feel warranted in accepting it as law: See also *Tasker v. Shepherd*, 6 Hurl. & N. 575.

As to death of a person not a partner, but a sole employer, see *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578; Wood on Master and Servant, secs. 95, 158.

The case of *Ferreira v. Sayres*, 5 Watts & S. 210, 40 Am. Dec. 496, is apparently in conflict with the text of Wood as above quoted; but we are satisfied to abide by the rule laid down in Wood, though it be at the expense of differing with the learned court of Pennsylvania by whom the last-named case was decided. The contract upon which the plaintiff's

suit was founded having become impossible of performance by reason of death, he had no right to recover upon the same against the surviving partner for services never actually rendered, and there was no error in granting a nonsuit. Of course the claim for board was on the same footing as that for wages.

Judgment affirmed.

MASTER AND SERVANT — TERMINATION OF THE RELATION BY DEATH. — Dissolution of a partnership by the death of a partner terminates the firm's liability to a servant hired by such firm prior to the death of the partner: *Lawson's Rights and Remedies*, sec. 283; *contra*, *Ferreira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496, and note.

PRINCIPAL AND AGENT. — As to the effect of the death of the principal upon the relation between the parties, and upon the acts of the agent subsequent to such death: Extended note to *Cassiday v. McKennie*, 39 Am. Dec. 81-91; *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *Lehigh etc. Co. v. Mohr*, 83 Pa. St. 228; 24 Am. Rep. 161.

MCGOWAN v. LUFBURROW.

[82 GEORGIA, 522.]

ESTATES OF DECEDENTS — JURISDICTION. — Equity has concurrent jurisdiction with courts of ordinary for the purpose of distributing estates; and where the court of ordinary would have had jurisdiction to pass an order for the sale of a portion of the property to pay off an indebtedness against an estate, a court of equity has the same power.

COLLATERAL ATTACK ON JUDGMENT. — **PRESUMPTION** is, that upon application to a chancellor in a matter over which he has jurisdiction, he will make a proper investigation as to the truth of the allegations contained therein; and unless the record shows the contrary, his judgment is valid, and not subject to collateral attack.

ESTATES OF DECEDENTS — INFANTS BOUND BY DECREE. — Where, upon application before a chancellor to sell the contingent remainders of minor heirs to pay debts due by the estate, such minors are represented by their next friend, who joined in the petition of sale, the chancellor has jurisdiction of their persons and property; they are his wards in chancery, and bound by his decree.

PLEADING AND PRACTICE. — **FAILURE TO FILE PETITION** to sell real estate to pay debts against an estate, in which all of the parties interested join, more than thirty days before the term commenced, as required by statute, is at most a mere irregularity, which does not avoid the decree, when, in fact, an *ex parte* petition need not be filed any number of days before court convenes.

JUDGMENTS — **EVERY DOUBT SHOULD BE RESOLVED IN FAVOR** of the validity of a judgment, where the rights of *bona fide* purchasers are involved.

George A. Mercer, and Chisholm and Erwin, for the plaintiff in error.

R. R. Richards, Lester and Ravenel, J. E. Wooten, and U. H. McLaws, contra.

SUMMONS, J. 1. The real and important question in this case is, whether the court had jurisdiction to pass the order of May 13, 1872, authorizing the executrix to sell the land in controversy. We think that it had. The executrix of this estate, together with her sons in their own right, and her son's children by next friend, filed their petition to the chancellor, wherein they alleged that certain debts were owed on account of the estate. It is true that in the schedule of such debts, annexed to the petition, they showed that the larger portion thereof consisted of drafts drawn, sometimes by the son upon the executrix and accepted by her, sometimes by the other son and accepted by his brother, and sometimes by the executrix and accepted by the son; but besides these drafts were certain accounts for improvements upon the estate. At any rate, the petition alleged that the estate owed debts, and that it was necessary to sell a part of the estate for the purpose of paying them.

If this petition had been addressed to the ordinary of the county, no one would doubt that he would have had jurisdiction to hear and determine the facts alleged therein; and if proper proof had been made before him, he could have passed an order authorizing the executrix to sell a sufficient portion of the property to discharge the debts due by the estate. If, therefore, the ordinary would have had jurisdiction to hear and determine the facts set out in the petition, the chancellor in this case also had jurisdiction; for it is well settled by the adjudications in this state, that a court of equity has concurrent jurisdiction for the purpose of distributing estates: *Dean v. Central Cotton-Press Co.*, 64 Ga. 670.

The jurisdiction of all courts depends upon the allegations in the pleadings. Counsel for the defendants in error contended that these pleadings, upon their face, show the want of jurisdiction, because the allegations show that the debts were debts of the life tenants instead of debts of the estate. That may be true as to the larger portion of the indebtedness, but it does not follow that because the life tenants were bound on the notes and drafts they were not originally the debts of the estate. In the case of *Dean v. Central Cotton-Press Co.*, *supra*, it appeared that the executor had borrowed money to pay off the mortgage. Besides, as we have seen, a portion of this indebtedness seemed to be for repairs made by a contractor up—

the property of the estate; and on the trial of this case, the jury found that a part of the debt was against the estate. If any part of the indebtedness alleged in the petition was due by the estate, the ordinary would have had jurisdiction to pass an order for the sale of a portion of the property to pay off that indebtedness, and a court of equity, having concurrent jurisdiction, as above shown, would have the like power.

The law presumes that when an application of this sort is made to the chancellor, he will make a proper investigation as to the truth of the allegations contained therein. It does not appear from the record that such an investigation was not made by the chancellor in this case; and it may be that he heard testimony on the subject, and ascertained, as the jury subsequently did, that at least a portion of this indebtedness was due by the estate. If he did, and had the proper parties before him, the judgment is not void, and cannot be attacked collaterally: Code, sec. 3593.

2. Did he have the proper parties before him? It is not disputed that the executrix and the two sons were properly before him, because all three united in the application. The contention is, however, that these plaintiffs (the defendants in error here) were minors at that time, and were not bound by the decree, because the court had no jurisdiction over them. We do not agree with this view of the case. The record shows that these minors were represented by their next friend, who joined in the petition for the sale of this property. The object of the decree was to pass to the purchaser their remainder interest in the property sought to be sold. It is true that the remainder at that time was a contingent one as to them, and it is further true that some courts and text-writers declare a contingent remainder not an estate, but only a chance to have one; but whatever differences may have heretofore existed between courts and text-writers upon this subject, our code has settled it by declaring that a contingent remainder is an estate: Code, secs. 2263–2265. These minors, therefore, had an interest or an estate which was to be passed upon by the chancellor. They were properly represented before him by their next friend. The code, sections 4221 and 4222, declares that “all proceedings *ex parte*, or in the execution of the protective powers of chancery over trust estates, or the estates of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand. A court of equity is always

open, and hence the judge in vacation and at chambers may receive and act upon such petitions, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court." This court, in construing these sections, in the case of *Sharp v. Findley*, 71 Ga. 665, says: "The very minute this petition came before this chancellor and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.'" See also 3 Pomeroy's Eq. Jur., sec. 1305, and notes. Here, as we have shown, was an application before the chancellor concerning the estate of infants. According to this decision, just as soon as the application was presented to him, they became his wards, or the wards of chancery. He thereby obtained power and jurisdiction over their persons and their property. Having shown that at least a part of the indebtedness represented in this petition was a debt against the estate, and that the ordinary of the county would have had jurisdiction to pass an order for the sale of a sufficient portion to pay the debts, and that a court of equity has concurrent jurisdiction, the payment of the debts of an estate being a part of the distribution thereof; and having shown that these children were properly before the chancellor, and that their estate was involved in the application made by them, we think it follows, as a logical sequence, that the court had jurisdiction both of the subject-matter and the person. Having jurisdiction of the subject-matter and the person, it had the power and authority to grant the decree set out in this record for the sale of the land.

3. But it is contended that while this may be true, the decree was passed at chambers, and not in term time, and that the chancellor had no power to pass such a decree in chambers. We have looked into the evidence in the record upon this subject, and we are inclined to think that the decree was passed by the chancellor in term time, and not in chambers. The evidence of the clerk of Messrs. Hartridge and Chisholm, who prepared this application, is, that it had been prepared some time before the meeting of the superior court in May, 1872, and that on the first day of the term this petition was presented to the chancellor in open court. The decree passed in the case was put upon the minutes of the court of that day, and we presume these minutes were signed by the judge either at the termination of the proceedings of that day or at the termination of that term of the court. It is true that on

the back it is marked, "in chambers"; but these words were left out by the clerk when he recorded the decree on the minutes of the court. From these facts, we conclude that the order was passed in term time.

4. But it is said that, admitting this to be true, still the petition was not filed thirty days before the court convened. Although the law at that time required bills to be filed thirty days before the term, we think, nevertheless, that the failure to file this petition thirty days before the term at which the decree was granted, could, at most, have been nothing more than an irregularity. The petition was not filed against any defendant, but all of the parties in interest joined therein. No defendant was called on to show cause why the prayer thereof should not be granted. We think, therefore, that the omission to file the petition thirty days before the term, even had it been irregular, would not have made the decree entered thereon void. But, in our opinion, it was not necessary to file an *ex parte* petition any number of days before the court. Section 4221 of the code, *supra*, does not prescribe any time wherein a petition of this character should be filed. It seems that if it is filed on the very day it is acted on by the chancellor, the filing is in sufficient time.

5. Taking this view of the facts and law of this case, it is unnecessary for us to discuss the other questions which were so ably and elaborately argued before us by counsel on both sides of the case, nor to comment on the cases cited by them as to what a chancellor can or cannot do in chambers. Having decided in favor of the jurisdiction, all controversy is closed. A judgment is a solemn thing,—the utmost solemnity of the law. Every doubt should be given in its favor, especially when the rights of a *bona fide* purchaser are involved. Such purchasers are favorites of courts.

Judgment reversed.

JUDGMENTS CANNOT BE ATTACKED COLLATERALLY, as a general rule: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and particularly cases cited in note 821; *Bateman v. Miller*, 118 Ind. 345; *Guttermann v. Schroeder*, 40 Kan. 507; *Keith etc. Coal Co. v. Bingham*, 97 Mo. 197; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129, and note 137, 138; *Gage v. Donney*, 79 Cal. 140; *Hill v. City Cab etc. Co.*, 79 Id. 189; *Peterson v. Hewitt*, 79 Id. 594.

JUDGMENTS, PRESUMPTIONS IN FAVOR OF. — Presumptions as to jurisdiction are indulged in in favor of judgments rendered in courts of general jurisdiction: *Adams v. Cowles*, 95 Mo. 501; 6 Am. St. Rep. 74, and note; *Commissioners v. Leggett*, 115 Ind. 544; *Ridling v. Stewart*, 77 Ga. 539; *Marks*

v. Matthews, 50 Ark. 338. Judgments by default are presumed to have been regularly obtained where the record fails to show the contrary: *Evans v. Young*, 10 Col. 316; 3 Am. St. Rep. 583; so every material fact not found by the lower court will be presumed in favor of a judgment: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788.

PRESUMPTIONS AS TO JUDICIAL PROCEEDINGS. — Where nothing appears of record showing affirmatively to the contrary, all actions and orders had and made in a judicial proceeding will be presumed to have been made for good reasons, and based upon proper grounds, as well as to have been regularly and correctly made and done: *Cleland v. Walbridge*, 78 Cal. 350; *McAulay v. Truckee Ice Co.*, 79 Id. 50; *Webb v. Trescott*, 76 Id. 621; *State v. Stephens*, 96 Mo. 637.

INFANT DEFENDANTS ARE AS MUCH BOUND by decrees in equity as persons of age: *Joyce v. McAvooy*, 31 Cal. 273; 89 Am. Dec. 172, and note. .

SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY v. FLANNAGAN.

[32 GEORGIA, 579.]

NEGLECT — EVIDENCE. — Where the declaration in an action against a railway company for personal injury alleges that an engine was old and worn out, and not supplied with proper brakes, evidence that such engine was supplied with hand-brakes only, while most of the other engines of the company had air-brakes, is admissible.

NEGLECT — EVIDENCE AS TO SPEED OF TRAIN. — In an action against a railway company for personal injuries, evidence is admissible to show the speed of the engine while on the company's property, and approaching the street where the accident occurred.

NEGLECT — EVIDENCE OF SPEED OF TRAIN. — In an action against a railway company for personal injuries, evidence of the habitual high rate of speed of an engine, causing the accident, when run by the same engineer on the same street, is admissible, as is also evidence of his habitual neglect to ring the bell.

NEGLECT. — EVIDENCE IS ADMISSIBLE, in an action against a railway company for damages for personal injuries, to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously.

EVIDENCE. — IN AN ACTION AGAINST A RAILROAD COMPANY for damages, it is error to admit evidence of the master-machinist against the company, given at a former trial, when he may be produced as a witness; but unless such evidence is sufficiently material, a new trial will not be granted.

NEW TRIAL. — ADMISSION OF INADMISSIBLE EVIDENCE is not ground for a new trial when it does not prejudice the party complaining.

PLEADING AND PRACTICE. — OPINION OF COURT UPON FACTS admitted or conceded to be true is not error.

PLEADING AND PRACTICE. — INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE. — In an action against a railway company for damages for personal injury, an instruction that if the injured party was in the employ of defendant, and guilty of contributory negligence, his widow could not

recover, is properly refused, when the injured party was not on duty at the time of the accident, but was remotely removed from the scene of his duties. The same rule was then applicable to him as applies to the general public.

PLEADING AND PRACTICE. — When the damages awarded are not excessive, nor the verdict contrary to law or the evidence, the judgment of the lower court will not be disturbed.

ACTION to recover damages. The husband of defendant in error was day-watchman in the employ of plaintiff in error, and while returning home from his work was run over and killed by an engine owned and controlled by the company and its servants. His duties were not connected with the running of the engine, and he was exercising due care at the time of the accident. He was killed on a public thoroughfare of the city commonly used by pedestrians and vehicles, and which was unfenced or otherwise guarded. The engine which ran over him was old and worn, not supplied with proper brakes, and hard to stop, and was being propelled at a high rate of speed, notwithstanding the city ordinances, rules of the company, and ordinary care required that it should travel slowly at that place. Verdict and judgment for two thousand five hundred dollars. The other facts are stated in the opinion.

Chisholm and Erwin, for the plaintiff in error.

Denmark and Adams, for the defendant in error.

BLECKLEY, C. J. The record makes the following questions on the admissibility of testimony: Was it competent to show that the engine which ran over the deceased was supplied with a hand-brake only, and that most or all other engines of the company had air-brakes? Was it admissible to show the speed of the engine while on the company's property and approaching the street where the accident occurred? Was it admissible to show the habitual high speed of the same engine when run by the same engineer, for some time previously, at the same place where the accident occurred? Was it admissible to show that, after the accident, the engines of the company ran more slowly at that place? Was it admissible to show the habit of the engineer, whilst running the same engine previously at the same place, not to ring the bell? Was it admissible to prove what the company's master-machinist had testified to on a previous trial? Was it admissible to prove that the deceased did not have expensive or extravagant habits; that he got less benefit from his wages than his wife

derived from them; that her clothes and medical attention cost more than his; that she was sick very often, etc.?

1. The objection to the evidence touching brakes was, that it was irrelevant, because no foundation for it was laid in the declaration. The declaration alleged that the engine was old and worn out, with brakes in bad condition, and not supplied with proper brakes. This, we think, was a sufficient basis for the evidence in question.

2. The speed of the train in approaching the place of accident, although at the time the speed was noticed by the witness the train was not upon the street, but upon the company's property, was not wholly irrelevant. The distance from the scene of the accident was not very considerable, and the engine was then upon the same journey which in its further progress resulted in the homicide. There is some little presumption that the speed of a train, when once shown, continues to be the same for a short distance at least, until a change of speed appears from the testimony, and we do not know that this presumption is varied by the fact that the train passed in the mean time from the company's property to the street. As trains do not run alone, but have one or more persons upon them, it is generally in the power of the company to show a change of speed, if any in fact took place.

3. The habitual high speed of this same engine, when run previously by the same engineer on the same street, was of doubtful admissibility. The authorities upon the question conflict. For the affirmative might be cited *State v. Boston etc. R. R. Co.*, 58 N. H. 410; *State v. Manchester etc. R. R. Co.*, 52 Id. 528; *Shaber v. St. Paul R. R.*, 28 Minn. 103; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140; 41 Am. Rep. 17; *Craven v. Central Pac. R'y Co.*, 72 Cal. 845; *Henry v. Southern Pac. R'y Co.*, 50 Id. 176; *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218; 67 Am. Dec. 155. For the negative, see *Gahagan v. Boston etc. R. R. Co.*, 1 Allen, 187; 79 Am. Dec. 724; *Chicago etc. R. R. Co. v. Lee*, 60 Ill. 501; *Baltimore etc. R. R. Co. v. Woodruff*, 4 Md. 242; 59 Am. Dec. 72; *Parker v. Portland Pub. Co.*, 69 Me. 173; 31 Am. Rep. 262. Patterson on Railway Accident Law, 421, throws the weight of his opinion on this side. Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our reports holding that doubtful evidence is to be admitted rather than excluded.

What has been said upon this point applies equally to evidence touching habitual failure to ring the bell.

4. There is much authority to the contrary (see Patterson on Railway Accident Law, 421, 422), but we think consistency with our own decisions requires us to hold that it was admissible to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously. The cause of this change of speed was a question for the jury: *Augusta etc. R. R. Co. v. Renz*, 55 Ga. 126; *Central R. R. Co. v. Gleason*, 69 Id. 200. The evidence was certainly of very slight value, but its admissibility did not depend upon what it proved, but upon its tendency.

5. As the master-machinist of the company was, so far as appears, still in life, and might have been produced as a witness, it was certainly error to admit in evidence against the company what he had testified to on a previous trial of the case. We can find no possible reason for recognizing his declarations, whether made upon oath or not, as admissions by the company. Certainly, the trial of an action for an alleged tort is no part of the *res gestæ* of the tort itself, and the general rule is, that declarations of an agent are not to be attributed to the principal, unless they are a part of the *res gestæ*. But this testimony, taken in the light of all the facts of the case, was not of sufficient materiality to require a new trial because of its improper admission.

6. The same may be said touching the admission of evidence to prove that the deceased did not have expensive or extravagant habits; that he got less benefit from his wages than his wife derived from them; that her clothes and medical attention cost more than his; that she was sick very often, etc. While some or all of this testimony was perhaps inadmissible, according to the strict rules of law, it did not, under the charge of the court, so enter into the measure of damages as to prejudice the railway company. And in this respect the present case is distinguishable from *Central R. R. Co. v. Rouse*, 77 Ga. 393. In that case, the court recognized an estimate made upon what would be required to support the wife and children, as an element in arriving at the amount of damages. No such standard was pointed to in this case.

7. Several exceptions were taken to the charge of the court. The whole charge is set out in the record; and construing it altogether, we think it substantially stated the law of the case on the material points with fairness to both parties. Some

objectionable passages appear; and did they stand alone, unmodified by other passages, they might be held erroneous. We see no good ground for a new trial in anything which the charge contains.

8. The complaint that the judge expressed an opinion upon the facts as to two or three matters is met by a statement in the charge to the effect that these matters were admitted or conceded. This statement should be taken as true, there being no verified contradiction of it in the bill of exceptions or elsewhere in the record: *Brantly v. Huff*, 62 Ga. 532.

9. This case having arisen prior to the act of 1887 forbidding any deduction from the value of the life on account of personal or other necessary expenses of the deceased, the rule for computing damages laid down in *Central R. R. Co. v. Rouse*, 77 Ga. 393, was applicable. And not only did the presiding judge give the railway company the full benefit of that rule, but went further, and treated luxuries, which the deceased was accustomed to enjoy, as being a subject-matter for deduction, the same as necessary expenses. Certainly, this was not only fair to the company, but liberal.

10. The instruction requested, that if Flannagan, at the time he received his injuries, was in the employ of the defendant, and if he contributed to the injury by any negligence, his widow cannot recover, was properly refused, for the reason that Flannagan was not only not on duty as a servant of the company at the time he was killed, but was not at nor near the scene of his duties. He was on the public street of Savannah, and occupied the footing in every respect, with reference to the running of the company's trains at that place, of the general mass of the public. We think, therefore, that the rule of contributory negligence applicable to the public under like circumstances was applicable to him. Nor does this view militate in any degree with the case of *Central R. R. Co. v. Henderson*, 69 Ga. 715, or any of the cases therein cited.

11. It is not clear to us that the damages awarded by the jury were excessive, or that the verdict was contrary to evidence or the law. We think the evidence made a somewhat doubtful case for recovery, but the jury and the presiding judge having been satisfied with it, we see no cause for reversing their decision.

Judgment affirmed.

APPEAL AND ERROR. — A new trial will not be granted for harmless errors which are not prejudicial to appellant: *Hansen v. Ponce*, 40 Minn.

127; 12 Am. St. Rep. 717; *Kern v. Bridwell*, 119 Ind. 226; 12 Am. St. Rep. 409; *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note.

APPEAL AND ERROR — REVIEW OF EVIDENCE. — The finding upon questions of fact by the jury, or the court sitting as a jury, is, as a general rule, conclusive and final; and when there is any substantial conflict of facts, the appellate court will not review or disturb the decision of the court below with reference thereto: *Pico v. Cohn*, 78 Cal. 384; *Stearnes v. Hooper*, 78 Id. 341; *Riley v. Melquist*, 23 Neb. 474; *Winslow v. Donelly*, 119 Ind. 565; *Juneau v. Stunkle*, 40 Kan. 756; *In re Kohler*, 79 Cal. 313; *Rodriguez v. Lambert*, 79 Id. 187; *State v. Boynton*, 75 Iowa, 753; *Bartlett v. Kauder*, 97 Mo. 356; *Harrison Wire Co. v. Hall etc. Co.*, 97 Id. 289; *McCallister v. Sigler*, 116 Ind. 476; *Hamburg etc. Co. v. Gattmann*, 127 Ill. 599; *Byrnes v. Hatch*, 77 Cal. 241; compare *Reitan v. Goebel*, 40 Minn. 408; *Pereira v. Smith*, 79 Cal. 232; *Menk v. Home Ins. Co.*, 76 Id. 51; 9 Am. St. Rep. 158; *Taylor v. Cayce*, 97 Mo. 242. But where mistake, fraud, or prejudice and passion manifest themselves in the rendition of a verdict, the appellate court will interfere and review the evidence: *St. Louis City v. Ratz*, 97 Id. 175; and where the record shows that the trial court acted upon incompetent testimony, the appellate court will reverse a judgment against the preponderance of the evidence: *Clapp v. Engledow*, 72 Tex. 252; so in an equity case, the appellate court may set aside a finding of the lower court which is manifestly against the preponderance of evidence: *Taylor v. Cayce*, 97 Mo. 242. Yet the determination of the court below upon questions of fact will be reviewed on a writ of error only so far as to ascertain whether there was competent evidence legally sufficient to support the finding: *Voorhis v. Terhune*, 50 N. J. L. 147.

REVIEW OF ORDER GRANTING A NEW TRIAL. — When evidence is conflicting, an order granting a new trial upon the insufficiency of evidence to sustain the verdict will not be disturbed upon appeal: *Harnett v. Central P. R. R. Co.*, 78 Cal. 31; *Mead v. Billings*, 40 Minn. 505; *Ohealey v. Mississippi etc. Co.*, 39 Id. 83.

CONTRIBUTORY NEGLIGENCE — EFFECT OF, AND SOME INSTANCES. — A plaintiff cannot recover if his own negligence contributed proximately to the injury complained of: *Davis v. Button*, 78 Cal. 247; *Chicago etc. R. R. Co. v. Warner*, 123 Ill. 38; but mere negligence on the part of plaintiff, unless it proximately contributes to the injury, will not prevent a recovery: *Ohio etc. R. R. Co. v. Hecht*, 115 Ind. 443. Voluntary drunkenness may constitute contributory negligence: *Strand v. Chicago etc. R'y Co.*, 67 Mich. 381. Compare *Williams v. Edmunds*, 75 Id. 92, as to what effect intoxication has upon the question of negligence. Failure to leave a railroad track when he saw an approaching train 390 feet away is contributory negligence: *Galveston etc. R'y Co. v. Porfert*, 72 Tex. 344. A tenant voluntarily making use of a stairway to her well known to be unsafe and dangerous, when necessity did did not demand its use, is guilty of contributory negligence: *Town v. Armstrong*, 75 Mich. 580. Failure of a child to take heed of warnings and signals before crossing a railroad track may constitute contributory negligence: *Baker v. Flint etc. R. R. Co.*, 68 Id. 90. A passenger is guilty of contributory negligence in going from car to car, while a train is in motion, to gain his proper car, when he took the wrong car through his own fault: *Stewart v. Boston etc. R. R. Co.*, 146 Mass. 605; see cases cited in note to *Columbus etc. R'y Co. v. Bridges*, 11 Am. St. Rep. 66, 67.

NEGLECT OF RAILROAD COMPANIES CANNOT ORDINARILY BE INFERRED from an undue or unusual rate of speed alone: *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; *ante*, p. 82, and note 87.

RAILROAD COMPANIES MUST EMPLOY the skill and knowledge usually employed in such matters in the construction of its works, bridges, roads, etc.: *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note 65.

RAILROADS, though not always required to adopt new machinery and new devices (*Gulf etc. R'y Co. v. Walker*, 70 Tex. 126; 8 Am. St. Rep. 582), are bound to exercise reasonable care in providing such suitable and safe appliances as common experience shows to be proper: *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 630; 55 Am. Rep. 508; compare *Hahn v. Missouri P. R'y Co.*, 92 Mo. 440.

RICHMOND AND DANVILLE R. R. CO. v. CHILDRESS.

[82 GEORGIA, 712.]

DAMAGES—POWER TO ORDER PERSONAL EXAMINATION OF PLAINTIFF. —

Where a party claims damages for an injury alleged to be permanent, the court has power, in its discretion, to order a compulsory personal examination of plaintiff, for the purpose of ascertaining the nature and extent of his injuries, by experts selected by the court and paid by the party at whose instance the examination is made.

Pope Barrow, and Jackson and Jackson, for the plaintiff in error.

Gartrell and Ladson, and J. T. Glenn, for defendant in error.

BLECKLEY, C. J. Childress, a lad thirteen or fourteen years of age, recovered a verdict against the railroad company for three thousand five hundred dollars, on account of a personal injury alleged to be permanent. The seat of the injury was the chest. The company made a motion for a new trial on several grounds, the fourth being as follows: "Because the court erred in declining to order the examination of Childress by physicians to be appointed by the court, on the motion of defendant before the jury was impaneled, but after the case was called for trial, for the purpose of determining whether or not he had been permanently injured as claimed; the said defendant offering to pay the expense of such examination by the physicians selected by the court." The court ruled that it had no power to order the examination without the plaintiff's consent. We understand the court as putting the refusal solely upon the ground of a defect of power.

The code, section 206, declares that "every court has power to control, in furtherance of justice, the conduct of its officers,

and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." It can certainly admit of no doubt that in a proper case for such examination the cause of justice would be subserved by it, and the decided weight of modern authority is that courts have such power. A very full and clear statement of the matter is found in 1 Thompson on Trials, section 859. The language of the author is as follows: "In modern trials of civil actions for physical injuries, the question has frequently arisen whether the court has power to order an inspection of the body of the plaintiff or person injured, for the purpose of ascertaining the nature and extent of the injuries. Some of the courts, carrying in their minds no higher conception of a judicial trial than the conception that it is a combat, in which each of the gladiators is permitted, within certain limits, to deceive and trick the antagonist and the umpire, have denied the right of the defendant to have an order for such inspection. Other courts, taking the more enlightened view that the object of a judicial trial is to enable the state to establish and enforce justice between party and party, have held that it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application seasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to compel the plaintiff or injured person to submit to it. Another court has held that where the plaintiff in such an action alleges that his injuries are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon, based upon a personal examination, unless there is already an abundance of expert evidence, in which case the court, in its discretion, may refuse to order an examination. Another court has ruled that the trial court may require the plaintiff in such an action to submit to a medical examination, and dismiss his action if he refuses to comply with the order. This conclusion may be placed upon the higher ground that when a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such an inspection is not higher than that of the old law, which would not even compel a party to produce a deed or private

paper in a civil case, where it was intended to be used in evidence against him,—a rule which the court of chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence.” The cases cited *pro* and *con* are: *White v. Milwaukee etc. R’y Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Walsh v. Sayre*, 52 How. Pr. 334; *Shepard v. Missouri P. R’y Co.*, 85 Mo. 629; 55 Am. Rep. 390; *Schroeder v. C. etc. R’y Co.*, 47 Iowa, 375; *Miami etc. R’y Co. v. Baily*, 37 Ohio St. 104; *Atchison etc. R’y Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659; *Hatfield v. St. Paul etc. R’y Co.*, 53 Am. Rep. 14; *Sibley v. Smith*, 46 Ark. 276; 55 Am. Rep. 584; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Neuman v. Third Avenue R’y Co.*, 50 N. Y. Sup. Ct. 412; *Roberts v. Ogdensburgh etc. R’y Co.*, 29 Hun, 154, disapproving *Walsh v. Sayre*, 52 How. Pr. 234, and *Shaw v. Van Rensselaer*, 60 Id. 143. See *Sidokum v. Wabash etc. R’y Co.*, 3 Am. St. Rep. 549, and note.

As to the suggestion made in argument, that the rule would operate hardly upon delicate and modest females, we can only say that they would be safely guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feelings of delicacy would be likely. We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding judge.

We think there ought to be a new trial in the present case. As we deal only with the question of power, we forbear to enter into the nature of the showing which ought to be required as preliminary to its exercise, further than to say that generally there should be a request made of the plaintiff before the trial comes on to submit to the examination voluntarily, and that when an order is applied for, the plaintiff’s refusal to do so should be verified, as also should the probability that examination would likely result in some material discovery or disclosure. When the examination is compulsory, there is obvious propriety in the experts being selected by the court rather than by one or both of the parties. It is likewise obvious that all the expenses should be borne by the party at whose instance the examination is made.

Judgment reversed.

PERSONAL PHYSICAL EXAMINATION. — As to the right of the court to compel or refuse to compel a physical examination: Note to *Stout City etc. R. R.*

Co. v. Finlayson, 49 Am. Rep. 728-730. The defendant has no absolute right to have a personal physical examination of the plaintiff; and the granting of such an examination rests in the discretion of the trial court: *Sidcham v. Wabash etc. R'y Co.*, 93 Mo, 400; 3 Am. St. Rep. 549, and extended note 554-556.

BAKER v. STATE.

[32 GEORGIA, 72.]

CONTEMPT, WHEN DONE IN PRESENCE OF THE COURT. — COURT IS NOT DISSOLVED by a mere recess or adjournment from day to day, and misbehavior affecting public justice, in the court-house and in the immediate presence of the judge, where he is attending, ready to resume business when the hour of recess expires, especially by a suitor, is misbehavior in the presence of the court, and may be punished summarily as a contempt of court.

Baker and Heyward, for the plaintiff in error.

T. W. H. Harris and T. W. Akin, for the state.

BLECKLEY, C. J. The constitution of the state provides that the power of the courts to punish for contempts shall be limited by legislative acts. This provision has been in every constitution which the state has adopted since that of 1861, and was in that also. The statute on the subject (Code, sec. 4711) is similar to the act of Congress passed in 1831. It declares that "the power of the several courts of law and equity in this state to issue attachments and inflict summary punishments for contempts of court shall not extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said courts, party, juror, witness, or other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." The conduct imputed to Dr. Baker as a contempt of the city court of Cartersville took place in the court-room, during the time appropriated to the regular sitting of the court, at September term, 1888, but in the recess of the court for necessary rest and refreshment, business having been suspended the previous afternoon or evening, and the time appointed by the judge for resuming business in the morning not having arrived by six or seven minutes. The matter of time will, perhaps, be put in the truest light by saying that the previous day's

work having been concluded, the court adjourned over to a stated hour next morning, and the misbehavior occurred from five to seven minutes before the recess expired. The judge had arrived, and was in attendance for the purpose of resuming and proceeding with judicial business, part of which was to conclude an unfinished trial. Some of the jurors who had been impaneled for the week were also present. Dr. Baker, himself a suitor in the court, was there to inquire about or look after his case. The place was the temple of justice, the time was term time, and the business in contemplation by judge, jurors, and party was court business.

Dr. Baker then and there entered upon the subject of his case, and insisted on discussing it, or making remarks about it to the judge, and in the presence and hearing of the jurors. What right did he have to do this if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the state's judges to be questioned by suitors about their cases, and listen to complaints elsewhere than in court? We think not. The office of judge would be intolerable to the holder, and degrading to the state, were the incumbent subjected by law to personal and private approach, questioning, and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge touching business pending in court is the place where the court sits, and the only time for it is during the sitting. And we think that whenever a judge of the city court is in the court-room during term, and a suitor there calls upon him to deal in any manner with or answer questions concerning a pending case, the court is in session respecting that case, to the extent, at least, of keeping the suitor in order in discussing it or making remarks about it, and that any misbehavior of the party then and there occurring takes place in the presence of the court, within the spirit and meaning of the statute above recited. Moreover, it is matter of necessity that the court shall be deemed in session throughout the term for the purpose of keeping order and maintaining decorum in the halls of justice. The orderly assembling of the court for the transaction of business after each temporary recess would otherwise be impracticable. If the judge had to scramble with a

mob of suitors, or others, to reach the bench every morning, and then could punish none of them for the indignity which they had offered the law and the public authority, because he had not succeeded in formally opening the court for the day's business before he was insulted, he would soon become powerless to administer justice. Of what avail would be the power of protecting the court against contempt after the judge actually seated himself on the bench, if while attending in the court-room for the purpose of so seating himself he could not command order, and enforce it by summary punishment? To the end that there may be a court held at all, it is necessary that the judge shall have the sanctity of the law's majesty about him whilst he waits officially in the temple of justice, both before and after each daily session. The court is not dissolved by mere recess; and misbehavior affecting public justice, in the court-house and in the immediate presence of the judge, especially by a suitor, is misbehavior in presence of the court, and may be punished summarily as a contempt of court. In *State v. Garland*, 25 La. Ann. 532, an attorney who used abusive language towards a member of the court, and committed an assault upon his person during a recess, and in the court-room, under the pretext of resenting what he had said or done when on the bench, was adjudged guilty of a contempt of court, and punished accordingly. The report in that case states that the court had not adjourned, and in the present case it is not expressly declared in the record that the court had adjourned the previous evening or afternoon, but we take it for granted that it had done so, as that is the usual course of business. We think, however, that necessary adjournments from day to day are but recesses in the sittings, and that when the judge returns to the court-room to resume business, the court at once has a "presence," and that disorder then and there committed affecting the public justice or business of the court is misbehavior in presence of the court. This precise question is not distinctly determined in the authorities which we have examined, and we have looked into very many referred to by Rapalje on Contempts; 3 Am. & Eng. Ency. of Law, 777; 15 Cent. L. J. 42; 12 Am. Dec. 178, notes to *Clark v. People*, etc. The city court of Cartersville, by its organic law (Acts of 1884-85, p. 487), has the same power to punish contempts as the superior court of the state. The punishment inflicted was very moderate, being a fine of twenty-five dollars, with the alternative of imprison-

ment two days in the event of non-payment. That the misbehavior merited this measure of punishment there can be no doubt. The complaining suitor, when warned that he was out of order, persisted in discussing his case, and closed by defying the judge, saying to him, "I have got as much right to talk as you have; court is not in session, and you have no more power than I have." He needed to be taught his true position as a suitor at the bar of public justice, and as he would not listen to admonition and remonstrance, the court instructed him in the proper manner.

Judgment affirmed.

CONTEMPT. — As to the power of courts to punish for contempt: Extended note to *Clark v. People*, 12 Am. Dec. 178-186; *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207, and note 213, 214.

CASES
IN THE
SUPREME COURT
OF
IOWA.

NEWMAN v. COVENANT MUTUAL INS. ASSOCIATION.

[76 IOWA, 56.]

LIMITATION OF ACTIONS — AMENDMENT TO PLEADINGS. — If, in an action commenced in time on a policy of insurance providing that no action can be maintained thereon which is not commenced within one year after the death of the insured, judgment for plaintiff is reversed because the relief asked for is legal, while that to which he is entitled is equitable, he may then, though more than a year has elapsed since the commencement of the action and the reversal, so amend his original pleadings as to demand the equitable relief to which he is entitled.

LIFE INSURANCE — WHO ENTITLED TO PAYMENT OF. — Though a policy of life insurance may provide that it is payable to the devisees of deceased, as designated in his last will and testament, still, if the insured dies intestate, the avails of his life insurance will descend to his wife and heirs or their assignee, the same as any other property or chose in action.

LIFE INSURANCE — WAIVER OF CONDITIONS. — Where a policy of life insurance provides that it shall be void if the insured shall use alcoholic drinks so as to injure his health, and that the insurer may cancel the policy when it comes to his knowledge that the insured has made false statements in this respect, or does so use alcoholic liquor, and that the policy shall be void if he dies from the effects of intoxication or while intoxicated, and the insurer's agent makes out a policy, well knowing the insured to be an habitual drunkard, and afterwards receives the premium without canceling the policy, the insurer thereby waives all the conditions in the policy, except that making it void if the insured dies while intoxicated, or from the effects of intoxication.

LIFE INSURANCE. — Judgment for the amount of the policy, with interest thereon from the time that the policy should have been paid, is proper, where a foreign life insurance company refuses to obey an order of court and pay a loss which occurred six years before. The officers of the corporation in another state cannot, in such case, be punished for contempt for disobeying the order of the court.

W. C. Calkins and F. C. Hormel, for the appellant.

Charles A. Clark, Henry Rickel, and E. H. Crocker, for the appellee.

ROTHROCK, J. 1. The opinion of this court on the former appeal of the cause will be found in 72 Iowa, 242. It was held upon that appeal that an action at law for the amount named in the policy or certificate could not be maintained; that, by the terms of the contract, the defendant's obligation was to make an assessment upon the members of the association, collect the assessment, and pay it to the beneficiary; and that no more than nominal damages could be recovered in an action at law. When the cause was remanded to the district court, and when the amended and substituted petition in equity was filed, the defendants moved to strike out the petition, and demurred thereto. The motion and demurrer were overruled.

The question arising upon these rulings of the court is elaborately argued by counsel. It is an important question in the case. If there was no right to amend the pleadings so as to present an action in equity, instead of one at law, and if the amendments set up an entirely new action, it could not be maintained, because the policy or certificate, which is the basis of the suit, expressly provides that no action can be maintained thereon which is not commenced within one year after the death of the insured. The statute of this state authorizing the amendment of pleadings is very comprehensive: Code, sec. 2689. Under this and other sections of the code it has become the rule to allow amendments, and to deny the right is the exception. When this cause was remanded to the district court, there was the same right of amendment as there would have been if it had not been tried. It was one of those cases where an amendment to the petition was absolutely necessary. In the opinion of this court, the plaintiff should have demanded an assessment upon the membership of the association, instead of asking a judgment at law. It was no more than an amendment of the prayer of the petition. If the claim was an honest one, and the defendant refused to make an assessment to pay it, there was a breach of the contract, for which it was liable. The plaintiff sought a recovery upon the policy. He set out in his petition and amendments thereto, before the first trial, every fact necessary to show that he was entitled to relief in some form. He made the mistake

of demanding a judgment for the amount, when he should have demanded that an assessment be made. If the objection to his petition had been made before the trial, it was his right to have his cause changed into the proper proceeding, and to amend the prayer of his petition accordingly. The error in claiming a judgment did not abate the action: Code, sec. 2514. By the amendments there was no change of the cause of action. If the plaintiff, when the cause was remanded, had sought to amend his petition by declaring upon the breach of a contract of insurance against loss by fire, that would have been a new cause of action. It would not have been an amendment. The cause of action in this case was the breach of the contract of insurance, and the amendment was merely a change of the form of the remedy. The right to make these amendments, by which causes are changed from the law to the equity jurisdiction of the court, and *vice versa*, have been too long practiced in our courts to be now called in question. As sustaining the views above expressed, see *Holmes v. Clark*, 10 Iowa, 427; *Weaver v. Kintzley*, 58 Id. 193; *Emmet County v. Griffin*, 73 Id. 163; *Case v. Blood*, 71 Id. 632; *Barke v. Early*, 72 Id. 273; *Barnes v. Hekla Fire Ins. Co.*, 75 Id. 11; 9 Am. St. Rep. 450; and *Cook v. Chicago, R. I. & P. R'y Co.*, 75 Iowa, 169. We have not thought it necessary to review the authorities cited by counsel for appellant upon this question. It is a question of pleading, which we must regard as settled in this state. The original petition was filed within a year after the insured died, and neither the limitation in the policy nor the limitation of the statute can be invoked as defenses to the action.

2. The certificate held by the deceased was made payable to the "devisees of William H. Hewitt, as designated in his last will and testament." When the plaintiff filed his amended petition in equity, he pleaded that the designation of the beneficiaries in the certificate was a mistake, and it was prayed that the same be reformed so as to be made payable to A. E. Hewitt, his wife, in conformity with the intention of the parties. The decree reformed the instrument as prayed. It appears that the deceased left no last will and testament, and there were, therefore, no devisees. It is claimed that there was not sufficient evidence to warrant the reformation of the contract. We need not determine this question. It appears that the widow of the deceased and all of his heirs assigned the policy to the plaintiff. Surely the

defendant ought not to seek to avoid its obligation by the alleged failure of a beneficiary. In such case, the heirs of the deceased are the beneficiaries. If he made no last will and testament, the right to the avails of the life insurance would descend to his heirs the same as any other property or chose in action: *Smith v. Covenant Mut. Ben. Ass'n*, 24 Fed. Rep. 685; *Covenant Mut. Ben. Ass'n v. Sears*, 114 Ill. 113.

We come now to a consideration of the facts in the case. The defendant is a corporation, and its place of business is at Galesburg, in the state of Illinois. The deceased was a resident of Marion, in this state, where he kept a hotel. The application for the insurance was taken in June, 1882, by one W. H. Wharry, an agent of the defendant. He had been at Marion for several weeks before the application was made, engaged in taking applications for insurance for the defendant. It does not appear that he had any other business. He boarded at the hotel kept by the deceased. Fifteen dollars was necessary to be paid by the deceased to constitute him a member of the association. When the application was made by an arrangement between Wharry and the deceased, five dollars of this amount was paid by a credit upon the account against Wharry for his boarding, and the deceased gave Wharry his promissory note for ten dollars, dated June 15, 1882, and payable July 15, 1882. Wharry changed the scene of his operations to Sycamore, Illinois, and sent the note to a bank at Marion for collection, where it was paid July 15, 1882, and the amount, with the proceeds of two other notes taken for insurance, was sent to him. It appears that the deceased was addicted to the excessive use of intoxicating liquors. He had acquired this habit years before he died. The testimony of a large number of witnesses was taken upon this feature of the case, from which it appears that his drunkenness was noticeable to every one who observed him. It is not disputed that he was a confirmed drunkard. Wharry knew this fact perfectly. He not only could not have failed to know it by observation, but the defendant had two medical examiners at Marion, and one of them told Wharry before he took the application that the deceased was not a proper subject for insurance, because of his habits. With this knowledge, Wharry took the application, after a medical examination by the other examiner. The defense upon the facts is based upon the intemperate use of alcoholic beverages. The application contains the usual stipulations, agreeing that the contract should be void if the in-

sured should habitually use alcoholic drinks liable to injure his health, and that if at any time he should impair his health by the excessive use of liquors, the contract should be void, and might be so deemed by the association. This application was not indorsed upon the policy, and for that reason no defense can be founded upon alleged false and fraudulent answers and statements in the application: Acts 18th Gen. Assem., c. 211; *Cook v. Federal Life Ass'n*, 74 Iowa, 746. But the defendant claims that by the very terms of the certificate or policy in suit it became void, and of no effect. It is provided therein, or rather indorsed on the back, and made part of the certificate, that if the assured "shall use acoholic, narcotic, or other stimulants to such an extent as to injure his or her health, or produce *delirium tremens*, or shall die while intoxicated, or from the effects of drunkenness, . . . the certificate shall be void, and of no effect." This being a part of the policy, the defendant has the right to avail itself of it as a defense so far as applicable to the facts of the case. But there is another provision of the policy, which is as follows: "If at any time during the lifetime of the holder of this certificate, reliable information and evidence shall come to the knowledge of the association that the said holder of this certificate did conceal facts which should have been stated, or did make false or untrue statements or representations in his or her application, on the good faith of which this certificate was issued, or if the said holder of this certificate shall be guilty of any criminal act, or shall injure or impair his or her health by immoral practices, or by the use of alcoholic, narcotic, or other stimulants, or shall become an habitual or excessive user of stimulants, have *delirium tremens*, or shall violate any one of the conditions and agreements contained in the application or this certificate, the association may, by written notice signed by its president or secretary, cancel and annul this certificate; and when so canceled and annulled, or rendered null and void by the violation of any part of this contract, all moneys which have been paid, and all rights and benefits which may have accrued, shall be absolutely forfeited."

The two clauses of the certificate are not necessarily repugnant to each other. By the last clause it was the right of the defendant to cancel the certificate when it came to its knowledge that the defendant made false or untrue statements in his application, or indulged in intoxicating liquors so as to injure or impair his health. The certificate was not issued in

reliance upon the good faith and truth of the application. The defendant did not issue the policy relying upon the representations made in the application. Its agent knew that the statements contained therein as to the decedent's habits were not true. With this knowledge upon the part of the agent, he forwarded the application, and, instead of recalling it, not only allowed a certificate to issue, but collected the money in payment therefor. How long he remained as a boarder at the hotel does not appear. If he remained at all, he knew that the deceased did not reform. We think it ought to be held that, as the defendant issued the certificate, knowing the decedent's habits, and afterwards received the premium without canceling the policy, it should be held to have waived the other provision rendering the policy void for the very same conduct of the deceased for which it had the right to rescind. Upon this question, see *Northwestern etc. Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192.

4. The only question of fact remaining to be determined is, Did the assured die from the effects of intoxication, or while intoxicated? The waiver of the right to cancel the policy did not waive that part of the contract by which the policy should be void if the assured died from the effects of intoxication or while intoxicated. The burden of proving this issue was upon the defendant. It is not claimed that the deceased was continually intoxicated. He left his home at Marion in a sober condition. He drank on the way, and when he arrived at Council Bluffs he was very much intoxicated,—so much so that the conductor of the train left him in the car in which he made his journey, and which arrived at Council Bluffs at one or two o'clock in the morning. The next known of him was that he registered his name at a hotel in Council Bluffs on that morning. He was next seen in the evening, at Omaha, and near the ditch where he was found dead the next morning. There was water in the ditch to the depth of three or four feet, and the bottom was soft mud. A witness for the defendant, who claims to have seen him at six o'clock in the evening, not far from the ditch, testified that he walked like a drunken man. It does not appear at what time in the evening or night he was drowned. As the inquiry is confined to his actual condition when he was drowned, we are not prepared to say that the learned judge who determined the case upon the last trial should have found that the defendant established this issue. There are some circumstances in the

case tending to show that the witness who testified that he saw the deceased in the evening was mistaken in identifying him as the person who was drowned. There are marked discrepancies in the description of the man seen by the witness and the deceased. These discrepancies pertain to the hat, clothing, and whiskers worn by the person seen by the witness.

5. As has been stated, the defendant refused to make the assessment ordered by the decree of the court. This decree was entered January 5, 1888, and the defendant was ordered to make return of its doings in that behalf by the first day of the next term, to which the cause was continued. On the fifth day of April, 1888, it being the March term of said court, a supplemental petition was filed, in which the decree of the former term was recited, and it was therein alleged that the defendant had disregarded and defied said decree by neglecting and refusing to make any assessment whatever, and that, by reason thereof, the plaintiff was unable to realize anything upon said certificate, and that defendant has a large amount of assets and property, and praying for a judgment for the amount of the certificate, with interest from the time an assessment should have been made before the suit was first instituted. A demurrer to this supplemental petition was overruled. The defendant stood on its demurrer; and the court, upon the record before it, and without the introduction of further evidence, entered judgment as prayed in the supplemental petition. It is claimed that this judgment is erroneous, and that the only power possessed by the court was to punish the officers of the company for contempt in disobeying the order to make the assessment. We think the judgment was not erroneous. It may be that the officers of this association honestly believed, when proofs of loss were made, that the association was not liable, or rather, was under no legal obligation to make an assessment to pay the loss. The record shows that they were in error in refusing to provide for the payment of the loss. They postponed it for nearly six years. It is well understood that the membership of these assessment associations is constantly changing; that new members are not assessable for losses which occur before they become members; and that assessments can be made only on the members liable to pay when the losses occur. It appears, from the answer of the defendant, that when this loss was payable there were at least five thousand members liable to

assessment in the sum of one dollar each for the payment of this death claim. No court, so far as we have observed, has determined just what is the liability of one of these assessment companies. This court, and most of the other courts of the country, have held that an action at law to recover the amount of the policy will not lie. The defendant's position is, that if the officers refuse to make an assessment, the remedy is punishment for contempt, which is a fine of fifty dollars. This is a safe refuge, and if adopted by the courts, it discharges the corporation from all liability; and for that matter, the court in this case would have been powerless to punish the officers for contempt. They are beyond the jurisdiction of the court, in the state of Illinois. Some one should answer for any shrinkage in an assessment now to be made on account of the delay. The party should suffer for it who is in the wrong, and the defendant is obviously that party. It should make good to the plaintiff what he has lost by its breach of its contract to make an assessment, collect the money, and pay it to the plaintiff. To require less upon the record made in this case would be a license to natural persons to organize corporations as a cover for the grossest frauds. Something is said in argument to the effect that the court had no jurisdiction to enter the decree, because the defendant is an Illinois corporation. The proposition is not sound. The defendant was properly brought into court, the decree was a personal decree, and the judgment is a personal judgment. It cannot be enforced by execution by the courts of this state; but, being a personal judgment against the corporation defendant, it will be entitled to full force and credit in the courts of Illinois.

Affirmed.

CONVERTING ACTION AT LAW INTO EQUITABLE ACTION BY AMENDMENT. — One is not estopped, by bringing an action at law, from changing such action by means of amendment into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75 Iowa, 11; 9 Am. St. Rep. 450.

LIFE INSURANCE. — A man may insure his life for the benefit of his wife and children, and the insurance is personal to them, when they survive him: *Hecker v. Sugg*, 102 N. O. 115; 11 Am. St. Rep. 717, and note 721-724, as to the results of the death of the beneficiary prior to the death of the person whose life is insured. Where a person obtains an insurance upon his life, payable to his "devisees or heirs at law," and dies intestate, without issue, the insurance will go to his widow, if any, to the exclusion of next of kin: *Alexander v. Northwestern Masonic Aid Ass'n*, 126 Ill. 558. But the immediate right of insurance money upon the life of a deceased vests in the personal

representatives, not at once in a legatee or other person entitled thereto: *Shove v. Shove*, 69 Wis. 425. Where a wife, the beneficiary in a life insurance policy upon her husband's life, dies before the husband, he cannot simply by his will, executed after the wife's death, dispose of the insurance money so as to divert it from the heirs of his wife, the beneficiary: *Olmstead v. Masonic etc. Society*, 37 Kan. 93. When the constitution of an insurance association provides that each member shall designate in writing a beneficiary who upon his death shall receive the insurance money, if there has been no one so designated, the association is under no legal liability to pay the money to anybody: *Order of Mutual Companions v. Griest*, 76 Cal. 494.

WAIVER OF CONDITIONS AS TO FORFEITURE OF INSURANCE POLICIES. — Insurance companies may and often do waive the enforcement of forfeiture because of conditions in insurance policies which are broken: *Stylos v. Wisconsin etc. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note; *Brown v. State Ins. Co.*, 74 Iowa, 428; 7 Am. St. Rep. 495, and note; *Fitzpatrick v. Hartford L. etc. Ins. Co.*, 56 Conn. 116; 7 Am. St. Rep. 288, and note; *Merk v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158, and note; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and extended note; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and note.

CONTEMPT. — Failure to pay money upon order of court does not necessarily constitute a contempt of court, though sometimes it does: *Clements v. Tillman*, 79 Ga. 451; 11 Am. St. Rep. 441, and note; *In re Wilson*, 75 Cal. 580.

STATE v. HALL.

[76 IOWA, 85.]

CRIMINAL LAW — LARCENY IN OBTAINING GOODS BY FALSE PRETENSE —

If the owner of goods or his employee parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with felonious intent to deprive the owner of the goods of his possession is larceny; or if possession is obtained by trick, artifice, or false pretense, with the felonious intent on the part of the accused to convert them to his own use, he is also guilty of larceny.

Wright, Baldwin, and Haldane, for the appellant.

BECK, J. 1. The undisputed facts of the case are these: Defendant employed a tailor in Council Bluffs to furnish the materials and make for him an overcoat and a pair of pantaloons. When the garments were finished, he went to the tailor's shop and tried on the overcoat, which proved quite satisfactory. He stated that he did not have money enough to pay for the clothing, but would have in a few days. He did not ask for credit. The tailor did not offer to give him credit, and replaced the garments where finished work was kept. In

three or four days thereafter the defendant returned at night, when the tailor was absent, and the shop was in charge of an employee. He said he wanted the garments. The employee proceeded to get them, and defendant took out his pocket-book, and counted out the money to be paid for them. He tried on the overcoat, and approved it. He then said he did not have quite enough money to pay for the garments, and asked the employee to wrap up the pantaloons, and go with him to his room, where he would pay for the clothing. The employee complied, and defendant wore the overcoat and took the other garment. When he reached a stairway on the street, he said to the employee, "Wait here a minute, and I will go upstairs and get the key of my room." He left the employee, and went up the stairs, and this was the last seen of him that night. The employee searched for him without avail. He left his old overcoat in the tailor-shop, saying he would return for it the next morning, which he did not do. At that time he had a room in Omaha, where he was arrested for this offense.

2. Where the owner of goods parts with their possession without the purpose of parting with the property therein, and expects their return or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with the felonious intent to deprive the owner of the goods is larceny. So if possession is obtained by a trick, artifice, or false pretense, with the felonious intent on the part of accused to convert them to his own use, he is guilty of larceny. These are familiar rules of the law: See Waterman's Criminal Digest, p. 373, sec. 9; p. 377, secs. 47-53.

3. The evidence clearly brings defendant's case within these rules. It is shown beyond dispute that his purpose was to obtain the garments without the tailor's assent, and thus, in the rogues' dialect, "beat him out of his money." The cheat and trick resorted to by defendant have often been practiced by this class of fellows, but are none the less criminal. The very moderate term in the penitentiary given to defendant by the court below will serve to teach rogues of defendant's class that it is no safer to commit larceny by deceit, trick, and the abuse of confidence which tradesmen are authorized to put in their customers, than by stealthily taking property with intent to steal it. The instructions given to the jury accord with the views we have expressed. In our opinion, the judgment of the district court ought to be affirmed.

OBTAINING GOODS UNDER FALSE PRETENSES. — To sustain a charge that goods were obtained by false pretenses, a felonious intent must be shown: *State v. Fields*, 118 Ind. 491; and to constitute this offense, it is not merely sufficient that one obtain goods from another with intent to defraud, but he must have obtained the goods by means of false pretenses; and a pretense to be false must actually be false, not merely believed to be so by him employing it: *State v. Asher*, 50 Ark. 427; *State v. Wasservogle*, 77 Cal. 173. An acquittal of a charge of forging and uttering a false note and chattel mortgage bars a prosecution for obtaining goods under false pretenses in exchange for such note and mortgage, when the same transaction is relied upon by the state in both prosecutions: *State v. Stone*, 75 Iowa, 215.

LARCENY — FALSE REPRESENTATIONS. — Where one bargains for goods under an assumed name, for which he pays only part of the purchase price, and immediately ships the goods to a distant state, and himself goes there, he is guilty of larceny, inasmuch as he evidently premeditatedly obtained the goods through fraud, and feloniously appropriated the same: *March v. State*, 117 Ind. 547. But a conviction cannot be had for the removal of property, upon which the accused held a lawful lien, when the agreement between the parties shows that the lien had become merged into absolute title in the accused; but otherwise a removal of property under such circumstances, with intent to defraud, would constitute larceny: *Smith v. State*, 84 Ala. 438; compare *State v. Fisher*, 38 Minn. 378, for an instance of larceny by a bailee.

OBTAINING MONEY UNDER FALSE PRETENSES. — To constitute this offense, four things must be alleged and proved, — intent to defraud, actual fraud, fraud by means of false pretenses, and the false pretenses must be shown to have induced the owner to part with his money: *People v. Wasservogle*, 77 Cal. 173; *State v. Asher*, 50 Ark. 427; *State v. Metsch*, 37 Kan. 222. In an indictment for obtaining money under false pretenses, the allegation that the act was committed "with intent to defraud" is sufficient: *White v. State*, 86 Ala. 69; *State v. Dixon*, 101 N. C. 741. In a prosecution of this character, it is necessary for the state to negative specifically the false pretenses: *State v. Metsch*, 37 Kan. 222. Where the language of the statute is, "by false pretense," the allegation "by reason of false pretenses" is sufficient: *Cocous v. State*, 22 Neb. 519.

OBTAINING SIGNATURES TO INSTRUMENTS THROUGH MEANS OF FALSE PRETENSES is a criminal offense in Iowa: *State v. Jamison*, 74 Iowa, 613; *State v. Clark*, 72 Id. 30.

TEACHOUT v. VAN HOESEN.

[76 IOWA, 113.]

FRAUDULENT REPRESENTATIONS — RIGHT OF ACTION. — Where plaintiff, who was defendant's confidential adviser, and engaged in the ice business, of which defendant was ignorant, advised the latter to invest in a new business of the same nature, enjoining secrecy in the matter, and representing that property purchased for the purpose cost twenty thousand dollars, when in fact it cost but fourteen thousand dollars; and defendant, relying upon the statement as true, invested to the extent of a one-third interest in a corporation formed for the purpose, paying therefor more than the other two thirds cost plaintiff and another incorporator,

such representation is actionable, being one of fact, and not a mere expression of opinion as to value; and as the representation was made before the corporation was formed, the defendant, and not the corporation, was the party injured thereby, and defendant may maintain a counterclaim to recover the damages resulting from such representations, notwithstanding the fact that he had sold his stock, and parted with all interest in the corporation.

ACTION to recover money paid by plaintiff as surety for defendant upon a promissory note. Defendant admitted the liability, but set up a counterclaim, alleging damages due from plaintiff for fraudulent representations made by him in organizing a corporation in which they were both stockholders. Upon the close of defendant's evidence, plaintiff moved that the jury be directed to return a verdict for him for the amount claimed, notwithstanding defendant's counterclaim. The motion was granted. Judgment for plaintiff. Defendant appeals.

Mitchell and Dudley, and Finkbine and McClelland, for the appellant.

Read and Read, and Baylies and Baylies, for the appellee.

ROTHROCK, J. 1. The ultimate question to be determined is, Was the court correct in holding, as matter of law, that, upon the issues presented by the counterclaim, and the evidence introduced in its support, the defendant was not entitled to recover any damages? It is not necessary to set out the counterclaim in full. In its substance it charges the plaintiff with fraudulent representations, to the damage and injury of the defendant, preliminary to and at the time of organizing a corporation known as the "Des Moines Ice Company." The stockholders of that corporation were three in number. They were the plaintiff (who held his stock in the name of one Myers), one Branson, and the defendant. The alleged false and fraudulent representations consist in inducing the defendant to become a stockholder by representing that certain real estate upon which there were ice-houses, and certain personal property used in carrying on the ice business, had been purchased by Teachout and Branson from one Grefe for the sum of twenty thousand dollars, and it was put into the enterprise at that valuation, when in truth and fact the purchase was made for the sum of fourteen thousand dollars, and that Teachout and Branson thereby secured an advantage in the organization of the corporation to the amount of six thousand

dollars. There was a reply to the counterclaim, and motions and demurrers were filed, and determined by the court. It is not necessary to notice the pleadings further, nor the rulings on the motions and demurrers, as the question presented for determination by the appeal will be apparent from a statement of the facts which the evidence tended to establish.

It appears, from the evidence, that the plaintiff was engaged in the ice business at Des Moines for several years prior to 1883, and the defendant was, during the same time, engaged as manager of the butter and egg business of Schermerhorn & Co., at the same place. The parties were well acquainted, and had more or less business relations, which consisted in the purchase of ice by defendant from plaintiff for use in the said business. On the sixteenth day of July, 1883, the firm of Branson & Co. entered into a written contract for the purchase of the real and personal property theretofore used by Grefe in conducting the ice business. The purchase price was \$14,000, of which \$2,050 was paid at the execution of the contract. The further sum of \$2,950 was to be paid in cash on the 1st of November, 1883, at which time Branson & Co. were to take possession of the property sold; and the remainder of the purchase price, being \$9,000, was to be secured by mortgage upon the property. Teachout was not known in this transaction. But from the inception of the enterprise he was one of the real parties in interest, and its most active promoter and managing spirit. The defendant had some money which he desired to invest, and frequently consulted Teachout, who was a successful business man, on the subject of business investments. After the contract was made for the Grefe property, and about September, 1883, the plaintiff proposed that defendant should take an interest in the Grefe property and ice business. Teachout was then engaged in the business at another place in the city, and desired to keep his interest in the new venture secret from the public, lest a rival company should start up, and he exacted a promise of secrecy from defendant as to the exact nature of the enterprise. He then told the defendant that he could have an interest in the business and property at cost. He represented to the defendant that the Grefe property and business cost twenty thousand dollars, of which eleven thousand dollars was to be paid by November 1, 1883, and the deferred payment of nine thousand dollars was to be secured by mortgage on the property, and paid in easy payments. Defendant had on hand about fifteen hundred dollars, and he

agreed to invest that amount on the basis of the cost of the Grefe property, with the privilege of increasing his interest to one third, and thereby hold an equal interest with Bronson and Teachout. Afterwards, the plaintiff proposed to defendant that the parties in interest should form a stock company or corporation instead of a partnership. The Grefe property and business were to be turned into the company on the same basis as it was to be turned into the partnership,—at cost. The corporation was organized with a capital stock of three hundred shares of one hundred dollars each, amounting to thirty thousand dollars. One hundred shares of the stock were issued to Branson, the same number to Myers for the benefit of Teachout, and at that time fifteen shares to the defendant. All of the money paid by the stockholders at that time was fifteen hundred dollars, paid by the defendant. The Grefe property was conveyed to the corporation. Teachout and Branson paid for their stock five thousand five hundred dollars each, by turning over their interest in the Grefe property, and the Des Moines Ice Company obligated itself to pay the nine thousand dollars deferred payments to Grefe. The defendant had an option to increase his subscription to place him on an equality with the other two corporate members, which he afterwards did by paying the further sum of four thousand dollars in cash. The defendant was induced to pay in five thousand five hundred dollars in cash in the belief that Teachout and Branson had each paid out that sum in the purchase of the Grefe property, when in truth and fact they had paid but five thousand dollars in the aggregate.

It thus appears, from the evidence, that Teachout and Branson each obtained a one-third interest in the corporation by the payment of two thousand five hundred dollars, and the defendant paid for his one-third interest the sum of five thousand five hundred dollars. That he was induced to do so by the representation made by Teachout that the Grefe property cost twenty thousand dollars is not only sustained by the evidence, but, as the plaintiff introduced no evidence, it is uncontradicted. It further appears, from the evidence, that before this suit was commenced, the defendant had sold his stock, and he is not now a stockholder in the corporation, and that the corporation paid dividends and was prosperous in its business during defendant's connection with it, and, for aught that appears, it is still successfully prosecuting its business. The motion to direct a verdict for the plaintiff was in writing,

and was in these words: "1. That the evidence in behalf of defendant fails to show that there were any material false representations made by plaintiff to him, as set forth in his counterclaim, but does show that plaintiff agreed with him that Branson & Co. would turn in to the Des Moines Ice Company the property purchased from Grefe at twenty thousand dollars, and that the same was done in accordance with said agreement. 2. That the evidence shows that if any cause of action exists in favor of any one against the plaintiff, the same exists in favor of the Des Moines Ice Company, a corporation, and that the defendant, as a stockholder, does not show any right to maintain said action. 3. That the evidence shows that the defendant has parted with his interest in the Des Moines Ice Company; that any cause of action that exists upon the facts shown is in favor of the Des Moines Ice Company; and that the defendant has no interest therein, and can maintain no suit therefor."

The first ground of the motion is to the effect that the evidence does not show that there were any material false representations made by the plaintiff. That the defendant was deceived, to his injury, and that Teachout profited by the deception, is apparent from the above statement of facts. It is wholly immaterial whether the stock paid dividends or not, or what amount the defendant received from the sale of his stock. The fact remains that, by the false representations of Teachout, he and Branson each acquired an interest in the venture equal to the interest of the defendant by the payment by each of less than half the amount paid by defendant. The defendant embarked in the business in the belief that Teachout and Branson had paid dollar for dollar with him, and this belief was generated in his mind by the false representations of Teachout. It is true, as claimed by plaintiff's counsel, that the defendant agreed with plaintiff that the Grefe property and business should be turned in to the Des Moines Ice Company at twenty thousand dollars, and that the same was done in accordance with the agreement. But this is no answer to the complaint that the plaintiff represented that twenty thousand dollars was the cost of the property, when the real purchase price was but fourteen thousand dollars.

Counsel for appellee insist that the representation as to the cost of the property was not an actionable false representation, because it was a mere affirmation of a seller, on which a purchaser is not authorized to rely. In other words, it is

claimed that the representation is akin to the representations of the value of property, which a purchaser must ascertain for himself. The familiar cases of *Medbury v. Watson*, 6 Met. 250, 89 Am. Dec. 726, *Hemmer v. Cooper*, 8 Allen, 884, and other cases, are cited in support of the rule contended for by counsel. But it is apparent that the cited cases have no application to the facts in this case. It may be conceded that where parties meet on equal terms, as is said in the case of *Medbury v. Watson*, *supra*, and the "vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or that he has refused such a sum for it, though known by him to be false, and though uttered with a view to deceive, are not actionable." These representations are regarded in the same light as representations of value, which are mere opinions. On the other hand, it was held in *Sandford v. Handy*, 23 Wend. 260, and *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 589, that a false affirmation by a vendor as to the actual cost of property may amount to an actionable false representation. The evidence shows that the defendant had no knowledge of the ice business. He relied upon the plaintiff as a confidential adviser. He was enjoined by plaintiff to secrecy in reference to the enterprise. The turning over the property to the corporation was not a sale to the defendant. The parties were jointly entering into a business enterprise, trusting in the honesty of each other; and they had the right to rely upon and expect the utmost good faith from each other. The representation of the actual cost of the Grefe plant was the representation of a fact, and not a mere opinion as to the value of the property.

2. The second ground of the motion to instruct the jury to return a verdict for the plaintiff is to the effect that if a cause of action exists in favor of any one, it is in behalf of the Des Moines Ice Company, and cannot be maintained by the defendant. In other words, it is claimed that as Teachout sold the property to the corporation, there was no privity between him and the defendant, and as Teachout's obligation was to convey to the corporation, he was bound to convey at the cost price, and an action would lie by the corporation for the benefit of all the stockholders. We do not think this position is sound. It is to be remembered that the fraud complained of had its inception before the corporation was organized. It was a personal transaction between individuals. In making

the representations complained of, the plaintiff was not acting as the agent of the corporation, but for the promotion of his own interest, and it seems that the reparation for the wrong done should be made by the wrong-doer to the person upon whom the injury was inflicted. The liability of the person who makes false representations to a purchaser of stock in a corporation is fully sustained by the following authorities: Kerr on Fraud and Mistake, 339, 341; Cook on Stocks, secs. 354, 355, 357; *Miller v. Barber*, 66 N. Y. 558; *Schwenck v. Naylor*, 102 Id. 688; *Short v. Stevenson*, 63 Pa. St. 95; *Paddock v. Fletcher*, 42 Vt. 389; *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188. The proposition that an action can only be maintained by the corporation finds a sufficient answer in the facts of this case. If a fraud was in fact perpetrated, as claimed by the defendant, the profits resulting therefrom were shared by Teachout and Branson, who were the owners of two thirds of the capital stock of the corporation. The proposition that the defendant's wrongs are to be righted by an action by the corporation against the two stockholders who shared in the proceeds of the fraud would, in effect, be an invitation for the corporation to bring an action against itself. The promoters and organizers of corporations should be held to a strict accountability for their acts. They ought not to be permitted to use a corporation as a shield to protect them from personal liability for their fraudulent acts, and should be required to respond to the party injured by their frauds. As is well said in the case last above cited: "When a fraud is committed in the name and under cover of a corporation by persons having the right to speak for it for their personal gain and benefit, they are bound to answer personally for their wrongful acts. Their tongues uttered the false words, and their purses should pay the damages." We do not question the rule contended for by counsel for appellee, that where the fraud consists in inducing share-holders in a corporation to enter into a contract in their collective capacity, it is an injury to the corporate interests, and the corporation is the proper party to maintain an action for a reparation of the wrong. But that rule can have no application to the case at bar. The counterclaim in this case is founded upon a personal contract prior to the organization of the corporation. The false representation was not made to any officer or agent of the corporation. It was made to the defendant to induce him to become a stockholder in a corporation to be thereafter organized. The plaintiff cannot be

permitted to hide behind a corporation. He should come into open daylight, and meet the party injured by his fraud face to face. It will be remembered that we are discussing these questions upon the evidence introduced by the defendant. We do not know whether it is true or not, but for the purposes of this appeal it must be accepted as the truth.

3. The third ground of the motion is, that the defendant cannot maintain his counterclaim, because he has sold his stock, and parted with all interest in the corporation. This is no defense to the recovery of damages for the alleged fraud. The sale of the stock did not operate as an assignment of his right of action for this fraud. It was a mere transfer of his interest in the corporation, and that interest would have been considerably more valuable, and presumably would have sold for more, if Teachout and Branson had each paid five thousand five hundred dollars for their stock, as they were bound in good faith to do to put them on an equality with the defendant. We think the court should have overruled the motion for a verdict, and required the plaintiff to proceed with the presentation of his side of the case.

Reversed.

FRAUDULENT REPRESENTATIONS. — As to what false representations will avoid a contract: *Chatham Fur. Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727, and note; *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202, and note.

MONTROSE PICKLE COMPANY v. DODSON AND HILLS MANUFACTURING COMPANY.

[76 IOWA, 172.]

ATTACHMENT. — GARNISHMENT will not lie against personal property in transit and outside the state, but in the custody of a common carrier whose residence is within the state. In such case the *situs* of the property does not follow the residence of the garnishee.

Anderson and Davis, for the appellant.

Craig, McCrary, and Craig, for the appellee.

ROTHROCK, J. At the time the action was commenced the plaintiff was a resident of this state. The defendant was a non-resident of the state, and a resident of the state of Missouri. Service of the original notice, and of the notice of garnishment, was made personally on the defendant in St. Louis, in that state. The defendant made no appearance in the

action, and a default was entered against it, and what appears to have been a personal judgment was rendered upon the default. It is not important to determine the effect of the judgment rendered upon service of the original notice out of the state. It is not a material question in the case. The Diamond Jo Line of steamers is an Iowa corporation, with its principal place of business at the city of Dubuque. It is a common carrier of freight and passengers upon steamers to and from all points on the Mississippi River between St. Paul, Minnesota, and St. Louis, Missouri. On the thirtieth day of September, 1887, said steamer company received on board of one of its boats, at Alexandria, Missouri, some five hundred or six hundred barrels of pickles, for transportation to St. Louis. The property was shipped by the Dodson and Hills Manufacturing Company at Alexandria, to the Dodson and Hills Manufacturing Company at St. Louis. The pickles were loaded on the steamer on the forenoon of that day. On the same day, and while the steamer, with the property in dispute on board, was on its way down the river to its destination, the garnishment notice was served on the steamer company at Dubuque, and on one of its agents at Keokuk.

The question to be determined is, whether the property was liable to attachment by garnishment. The superior court held that the garnishee was not liable, because the property was not within the jurisdiction of that court; that the defendant's title thereto was not doubtful; that it was capable of manual delivery, and, if within the jurisdiction of the court, it should have been levied upon and taken into custody by the officer executing the writ of attachment; and that it was not the subject of garnishment. This is the sole question presented to this court for determination. The ground of the attachment was that the defendant was a non-resident of this state. An attachment issued upon this ground avails nothing, unless the defendant has property or debts owing to him within this state. Without such property or debts, there could be no service of the attachment, either by actual levy, or by the process of garnishment. It is not claimed by appellant that any jurisdiction of the property could be obtained by seizing it outside the state. The contention is, that as the garnishee is a resident of the state, the *situs* or location of the property in question must be held to be in this state. This rule has been held to apply to debts owing by the garnishee to the defendant: *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 346.

That was a case of garnishment of the wages of a railroad employee. The garnishee was held to be a resident of this state, and there was no contract that the wages due were to be paid in the state of Nebraska, where the employee resided, and the garnishee had its principal place of business. It appears to us that the right to garnish the steamer company, and hold it for the value of the property in question in this case, presents a very different question. The law of attachment in this state does not contemplate that property not actually within the state, but located in another state, shall be the subject of garnishment. We need not cite the various sections of the statute upon the subject of attachment and garnishment. Its whole scope and tenor lead to the conclusion that the claim made by counsel for appellant cannot be sustained. The argument of the appellant is grounded upon the thought that when the garnishment notice is served the relation of debtor and creditor at once arises between the garnishee and the defendant. It is true, the statute provides that a judgment may be rendered against the garnishee if he does not deliver the property to the sheriff. This is a right given to the garnishee. He may at any time, after answer, exonerate himself by placing the property at the disposal of the sheriff: Code, sec. 2986.

If property in a distant state may be reached by process of garnishment, in order to avail himself of this right the garnishee must transport the property to the sheriff holding the writ, and deliver it to him. The garnishee cannot be deprived of this right, and as he is an innocent party, he cannot be compelled to bring the property within the jurisdiction of the court. The facts in this case are as good an illustration of the fallacy of this claim as can be given. The steamer company had taken this property upon one of its boats, and was under way, bound under its contract of affreightment to deliver the same at St. Louis. To avail itself of its right under the above statute, it would be required to ship the goods back to Keokuk, make its answer, and deliver the property to the sheriff. The law imposes no such an obligation upon a garnishee; and yet, under the claim made by appellant, the garnishee must either do this or become the debtor of the defendant for the value of the property. The law puts no such a hardship upon a garnishee. It is very different where a debt is garnished. It is a debt first and last. In such case the process of the law does not practically compel the garni-

shee to become a debtor against his consent. This identical question was determined by the supreme court of Wisconsin in the case of *Bates v. Chicago etc. R'y Co.*, 60 Wis. 296; 50 Am. Rep. 369. In an elaborate opinion, in which many of the authorities cited by counsel in this case are reviewed, it was held that personal property under the control of a garnishee, but situated out of the state where suit is brought, cannot be reached by the process of garnishment. In that case, as in this, the property was in actual transit, and out of the state, when the garnishment notice was served. We do not think it necessary to do more than refer to that case and the authorities therein cited. It appears to us in its reasoning to be eminently sound, and that no other conclusion could have been fairly reached; and the rule adopted has peculiar force when applied to an attempt to garnish a common carrier while transporting goods outside of the state where suit is commenced. As was said by Chief Justice Breese in *Illinois Cent. R. R. Co. v. Cobb*, 48 Ill. 402: "When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such process, merely because it had received that to be carried which the law compelled it to receive and carry." It will be understood that we do not determine the question as to the right to garnish a carrier of property, where the same is within this state.

Affirmed.

ATTACHMENT AND GARNISHMENT. — Property outside of the state cannot be garnished; and it seems that a carrier cannot be garnished for goods *in transitu* at the date of service of the process: *Bates v. Chicago etc. R'y Co.*, 60 Wis. 296; 50 Am. Rep. 369; *Bowen v. Pope*, 125 Ill. 28; 8 Am. St. Rep. 330, and note.

MINNEAPOLIS AND ST. LOUIS R'Y CO. v. COX.

[76 IOWA, 306.]

SPECIFIC PERFORMANCE — SUFFICIENCY OF DESCRIPTION. — A contract for the conveyance of land, which describes it as a certain congressional subdivision "lying south of the grove," cannot be avoided on the ground of vagueness or insufficiency in the description. Such description is certain, as a grove may be taken as a land-mark or monument designating the boundaries of land.

SPECIFIC PERFORMANCE — MUTUALITY. — Where a contract for the conveyance of land is made in consideration that the vendee shall erect and maintain a depot at a designated place, after the depot is built the ven-

der cannot avoid specific performance on the ground that the vendee cannot be compelled to maintain the depot.

SPECIFIC PERFORMANCE. — A vendee may demand specific performance of a contract to convey land before complying with certain conditions subsequent, when the performance of certain conditions by the vendor are necessary to secure to the vendee his rights to be acquired under the contract.

SPECIFIC PERFORMANCE — CONSTRUCTION OF CONTRACT. — Where a contract for the conveyance of land is made in consideration that a depot will be located, erected, and maintained at a certain place, and that trains will be run to and from such place before a given time, the contract cannot be avoided on the ground that the depot was not built by the time prescribed in the contract. The contract prescribes only the time when trains shall be running, and not the time when the depot shall be built.

SPECIFIC PERFORMANCE. — A contract for the conveyance of land cannot be avoided on the ground that it does not embody the agreement of the parties, and was signed in ignorance of such variation from the agreement.

Wright and Farrell, for the appellants.

A. E. Clarke, for the appellee.

BECK, J. 1. The contract which the plaintiff prays may be specifically performed by defendants is in the following language:—

“In consideration of the location and maintenance of a depot within ten rods of the south line of east half of northeast quarter of section 16, township 87, range 28, Webster County, Iowa, and the building and maintenance of the usual depot-buildings at said point, and the running of trains to and from the same before November 1, 1881, by the Minneapolis and St. Louis Railroad Company, we agree to convey to said railroad company, upon the performance by it of said conditions, a strip of land one hundred (100) feet in width,—the same being fifty (50) feet in width on each side of the center line of the Minneapolis and St. Louis railroad, where the same is now located over and across the east half of northeast quarter of section 16, township 87, range 28, Webster County, Iowa; and also a strip of land two hundred (200) feet wide, on the westerly side of the adjoining said one-hundred-foot strip, and being one thousand (1,000) feet long, and commencing at said south line, and running thence north one thousand (1,000) feet; and the undivided one half of that part of said east half of northeast quarter lying south of the grove thereon, not included in said depot-grounds or right of way. For the like consideration, the said E. H. Cox waives and relinquishes the damages allowed for said right of way by the commission-

ers. The railroad company shall pay the damages allowed Anderson, and shall also pay the expenses of platting and recording plat of said land into town lots. The said Cox shall give a bond, as provided by law, against any encumbrance on said land.

"E. A. COX.

"ADA COX."

The plaintiff alleges that it performed all the conditions of the contract within the time prescribed therein, and that defendants have refused to convey the property as they are obligated to do by the contract. The defendants admit the execution of the contract, and that they refuse to convey any property under it. As a special defense, they allege that the description of a part of the property, as set out in the contract, is too vague, indefinite, and uncertain to be enforced, and no decree for specific performance will therefore be rendered. For a further defense, they alleged that the agreement between the parties, which the contract was made to express, was in fact different in its provision, in that it provides that a divided half instead of an undivided half of the land shall be conveyed. It is alleged that the agreement between the parties differs from the contract in some other respects, which need not be particularly stated. It is alleged that the contract was draughted by the agent or attorney of plaintiff, who, through negligence or fraud, omitted to insert the conditions correctly in the contract; and defendants, relying upon the written contract as a true expression of the agreement of the parties, executed it.

2. The description which defendants insist is so uncertain as to defeat the contract is of the undivided one half of a part of the tract referred to by the congressional description. The description is surely without uncertainty or vagueness, unless these defects arise from the reference to the grove, south of which the tract is situated. Indeed, counsel urge no other ground of objection to it. Surely, a grove is an object which may be taken as a landmark — a monument — designating the boundaries of land. The description of the land, leaving out the words "lying south of the grove," is clear, and taken in connection with the description by the congressional subdivision, to which reference is made in the contract, is complete, plain, and without objection. The words referred to describe the land to be conveyed as "lying south of the grove." The description is certain. In order to find the land, the congressional subdivision is to be followed. The grove is to be discovered, and the land in the congressional subdivision lying

south of the grove is the land to which the contract pertains. The law requires no more particular description. It is surely reasonably certain, and according to the authority cited by counsel, nothing more is required: 3 Pomeroy's Eq. Jur., sec. 1405.

3. Counsel insist that, as the courts will not compel plaintiff to maintain a depot at the place designated in the contract, which is of the consideration thereof, the mutuality of the contract, which is essential to authorize a decree for specific performance, is wanting. But it cannot be doubted that plaintiff may be compelled to maintain the depot after it is erected, and defendants have performed their part of the contract. The plaintiff, having built the depot under its contract, may demand of defendants performance on their part. If it fail to maintain the depot, it will surely be answerable to defendants for the breach of the contract.

4. It is urged, as a defense to the action, that plaintiff has not paid for platting the land, and the damages provided for by the contract. It is admitted that these matters were not conditions precedent, but it is claimed that, as plaintiff has not indicated its willingness to perform the contract in this regard, it cannot demand a specific performance. Surely, plaintiff will not be required to perform its contract, which is not a condition precedent, before it can call on defendants to perform theirs, which alone can secure plaintiff in the rights it acquired under the contract.

5. It is insisted that the depot was not built in the time prescribed by the contract. As we understand the contract, it does not obligate the plaintiff to build the depot within a prescribed time. It prescribes the time in which the road shall be running. But we do not think the evidence shows it was not operated to the station at the time prescribed in the contract.

6. The defenses pleaded by defendants, that the contract does not embody the agreement of the parties, that it was signed in ignorance of its variance from the agreement, etc., cannot be urged to defeat the plaintiff's action. The law will not permit evidence of this kind to vary or defeat contracts. All agreements and negotiations preliminary to or contemporaneous with the written contract are merged therein, and the party signing a contract without having read it, or taken precautions to ascertain its contents, is bound thereby: *McCormack v. Molburg*, 43 Iowa, 561; *McKinney v. Herrick*, 66

Iowa, 414. The foregoing discussion disposes of all questions in the case.

The decree of the district court is affirmed.

SPECIFIC PERFORMANCE OF CONTRACTS is a matter peculiarly resting with courts of equity: Note to *Adams v. Messinger*, 9 Am. St. Rep. 684. The specific performance of a contract is not a matter of absolute right, but rests in the sound discretion of the court: *Ramsay v. Green*, 99 N. C. 215; and it is a well-settled rule that equity will not interfere in cases of contract, and decree specific performance, except in cases where it can be done mutually and completely: *Pingle v. Conner*, 66 Mich. 187; *Hall v. Loomis*, 63 Id. 709; *Welch v. Whelpley*, 62 Id. 15; 4 Am. St. Rep. 810; *Iron Age etc. Co. v. Western U. Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758, and note.

DESCRIPTIONS OF REAL PROPERTY IN CONVEYANCES, the rules for construing and determining the sufficiency of: Note to *Heaton v. Hodges*, 30 Am. Dec. 735-742; *Hamilton v. Harvey*, 121 Ill. 469; 2 Am. St. Rep. 118, and note; *Nippolt v. Kammon*, 39 Minn. 372; *Tierney v. Brown*, 65 Miss. 563; 7 Am. St. Rep. 679, and note; *McGlawhorn v. Worthington*, 98 N. C. 199; *Jones v. Parker*, 99 Id. 18; *Coker v. Roberts*, 71 Tex. 597; *Roberts v. Preston*, 100 N. C. 243; *Rayburn v. Winant*, 16 Or. 319; *Wright v. Lassiter*, 71 Tex. 640; *Tram Lumber Co. v. Hancock*, 70 Id. 312; *Land Co. v. Chisholm*, 71 Id. 523; *Nye v. Moody*, 70 Id. 434; *Sanborn v. Mueller*, 38 Minn. 27. The general rule is, that a conveyance, to be valid, must describe the realty therein sought to be conveyed by its exact terms, or give at least such data as will enable it to be identified: *Coker v. Roberts*, 71 Tex. 597. So if one conveyance refers to another conveyance for a further and more complete description, such other conveyance may be resorted to for the description: *Cleveland v. Sims*, 69 Id. 153.

SPECIFIC PERFORMANCE OF AN ORAL AGREEMENT to convey lands will not be decreed where the court is unable to determine what the actual agreement was: *Burke v. Ray*, 40 Minn. 34.

PICKET v. GARRISON.

[76 IOWA, 847.]

FRAUDULENT CONVEYANCE TO DEFEAT ALIMONY. — A claim for alimony is not a debt, within the meaning of that term as used ordinarily, and must be ascertained and allowed according to equitable principles; still it is a right, contingent to some extent, which becomes vested with the right to a divorce, and cannot be defeated by a fraudulent conveyance by the husband any more than it could were it a sum fixed and certain in amount.

FRAUDULENT CONVEYANCE TO DEFEAT ALIMONY. — In an action to set aside an alleged fraudulent conveyance by a husband, executed to defeat his wife's claim for alimony, it is competent to prove that before divorce proceedings were commenced, and the day before the conveyance was made, the husband, without the wife being present, consulted with his attorney in regard to the property in dispute. Such evidence is admissible to show the wrongful intent of the husband, and tends to explain his subsequent acts.

FRAUDULENT CONVEYANCE TO DEFEAT A WIFE'S CLAIM FOR ALIMONY is shown by evidence that after an attempted settlement between husband and wife had failed, and the day before divorce proceedings were commenced by her, he arranged with the purchaser and a banker to meet at the bank at six o'clock the next morning, at which time a bill of sale of the disputed property was executed, and the purchase price, excepting five dollars previously paid, was advanced by the banker, and possession of the property immediately taken; that such conveyance included substantially all the property owned by the husband, and that the purchaser knew of the wife's presence and feared her interference with the property, and that on the day of the transfer there was a struggle on the part of the wife to have her writ of attachment against the property issued and levied before the husband could dispose of it.

FRAUDULENT CONVEYANCE TO DEFEAT ALIMONY. — A purchaser's title to property worth two thousand dollars, shown to have been conveyed to him to defeat a wife's anticipated claim for alimony, cannot be sustained by proof that the purchaser paid five dollars on account prior to the commencement of the divorce proceedings, and that he had no knowledge, as far as the record shows, of any trouble between husband and wife, nor any reason to anticipate divorce proceedings between them.

J. H. Smith, and L. R. Bolter and Sons, for the appellant.

Cyrus Arndt and S. H. Cochran, for the appellee.

ROBINSON, J. For some time prior to the thirtieth day of January, 1888, one F. Hosford was the owner of the property in controversy, which consists of horses, buggies, and other articles, comprising a livery stock, kept in the town of Missouri Valley. Appellant claims that, prior to the twenty-first day of that month, he had negotiated for the purchase of this stock, and that on the day named he agreed to take it at the price of two thousand two hundred dollars, and paid thereon the sum of five dollars; that on the thirtieth day of January the purchase was concluded, the remainder of the price paid, and possession taken. It appears that on the last-named date the wife of Hosford commenced an action for divorce, in which she asked and was given a writ of attachment against the property of her husband. This was served a few hours after plaintiff claims to have perfected his purchase, by levying upon and taking the property alleged to have been purchased as aforesaid. This action was brought to recover that property.

1. Appellant insists that the claim of the wife for alimony was not in the nature of a debt; that she was not a creditor of her husband; and that the purchase by plaintiff of the property in controversy gave him a good title thereto, even though when he made it he was chargeable with notice of the fact that the husband was transferring the property for the purpose of placing it beyond the reach of his wife. The case of *Dan-*

ies v. Lindley, 44 Iowa, 567, is relied upon as supporting this position. That case decided that the whole of the real estate of the husband could not be seized and passed over to his wife to the exclusion of creditors; that alimony is an equitable allowance made to the wife upon the dissolution of the marriage relation, and that it should be based upon the value of the husband's estate, taking into consideration his debts. No question of fraudulent conveyance was involved. While it is true that the claim for alimony is not a debt within the ordinary meaning of that term, and that it must be ascertained and allowed according to equitable principles, yet it is also true that it is a right, contingent to some extent, which becomes vested with the right to a divorce. It can no more be defeated by a fraudulent conveyance than it could if it were fixed and certain as to amount. As bearing upon this question, see *Day v. Lown*, 51 Iowa, 369; *Miller v. Dayton*, 47 Id. 318; *Chase v. Chase*, 105 Mass. 386; *Bongard v. Block*, 81 Ill. 186; 25 Am. Rep. 276; *Bouslough v. Bouslough*, 68 Pa. St. 499; *Draper v. Draper*, 68 Ill. 21.

2. Objection is made to rulings of the court in permitting certain questions to be asked of a witness, the answer to which showed that on Sunday, the twenty-ninth day of January, Hosford consulted a lawyer in regard to the property in controversy. It is insisted that, since no divorce proceedings had then been commenced, and plaintiff was not present, the evidence was incompetent and immaterial. But it is shown that Hosford was called from Missouri Valley to Logan, to meet his wife and her attorney, with a view to settlement. He went, but no settlement was effected. Immediately after leaving his wife and her attorney, he visited his attorney, and consulted in regard to the property in controversy. We think it was competent to show that fact. It was necessary for the defendant to show the fraudulent nature of the transfer, and the wrongful intent of the husband. The facts shown by the evidence in question were circumstances connected with the transaction which were proper for the jury to consider in determining its true character. They tended to explain the subsequent acts of the husband, and were rightly admitted for that purpose, even though they were not within the knowledge of plaintiff.

8. It is next insisted by appellant that the verdict is not sustained by the evidence. It is shown that but five dollars were paid by plaintiff prior to January 30th; that Hosford went

to Logan to settle with his wife, and failed; that he returned from Logan to Missouri Valley about nine o'clock in the evening of the 29th; that he and plaintiff talked together after his return for nearly half an hour; that between ten and eleven o'clock that night plaintiff called at the house of a banker in Missouri Valley, and arranged with him to be at his bank at six o'clock the next morning; that at the time appointed plaintiff, Hosford, and the banker met at the bank, a bill of sale of the property was drawn, the purchase price, excepting five dollars, was borrowed of the banker and paid to Hosford, and possession of the property was immediately taken. There was also evidence tending to show that plaintiff knew that Mrs. Hosford was at Logan; that the judge made an order allowing the writ before he had risen Monday morning, the 30th; that the writ was issued as soon as the clerk's office was open, and that there was a struggle on the part of the wife to have her writ issued and levied before the husband could dispose of his property. It is shown that plaintiff knew of Hosford's visit to Logan, and that he feared interference with the property. Also, that it comprised substantially all of the property owned by Hosford. Other facts tending to show fraud and knowledge on the part of plaintiff need not be specified. We think the verdict was sustained by the evidence.

Much stress is laid by appellant upon the fact that when plaintiff paid five dollars on account of the purchase on the twenty-first day of January, he had no knowledge, so far as the record shows, of any trouble between Hosford and his wife, and had no reason to anticipate divorce and attachment proceedings. If this is as claimed by appellant, it would not authorize a reversal of the judgment. The sum paid was merely nominal, and while it may have been sufficient as between the parties to the contract, it did not justify appellant in an attempt to place the property and its proceeds beyond the reach of the wife. The jury found the value of the property in controversy to be two thousand dollars. Defendant elected to take judgment for fifteen hundred dollars and costs, and it was so rendered. We think it is correct, and it is therefore affirmed.

FRAUDULENT CONVEYANCES. — Transfer of property by a husband, for the purpose of hindering, delaying, or entirely defrauding a wife in obtaining alimony or a separate maintenance, when a suit for divorce is pending, or about to be brought, is fraudulent: *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162, and note.

METZGAR v. CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

[76 IOWA, 287.]

RAILROADS — DEVICES TO PREVENT FIRES. — It is the duty of railroad companies to use the best devices available to prevent the escape of fire from their engines, irrespective of the usage of other roads; and when an invention or appliance has been tested, and generally approved as better than that already in use by it, it then becomes its duty, with all reasonable diligence, to adopt and use such invention upon its engines, and it cannot defer doing this until it has been adopted and used exclusively by some other road.

RAILROADS — LIABILITY FOR FIRES. — An instruction is properly refused in an action against a railroad company for damages caused by fire set by its engine, which ignores the fact that, so far as danger from fire is concerned, the company might reasonably use engines with one sort of smoke-stack at one season of the year, and in some localities, without risk, while it might be unable to use the same engines at other seasons of the year, and in other localities, without incurring risk.

PLEADING AND PRACTICE. — INSTRUCTIONS not based upon any theory raised in the case are properly refused.

EVIDENCE OF TITLE. — In an action against a railroad company for damages for the value of hay destroyed by fire set by the company's engine, plaintiff may prove his title to the hay by evidence that it was cut on land leased by him of an agent of the owner, the agent testifying that he had controlled and paid the taxes on the land for fifteen years, as agent for the owner; that he has leased it for the latter, and sold the hay on it to the plaintiff.

George E. Clarke, for the appellant.

Parker and Richardson, and C. A. Dunwell, for the appellee.

ROBINSON, J. The evidence shows, without conflict, that the hay in question was destroyed on the date alleged, by a fire which was started on or near defendant's right of way. Defendant denied the allegations of wrong on its part, and pleaded that the engine which is said to have caused the fire was of approved pattern and manufacture; that at the date of the fire it was in good condition, and supplied with the latest improvements, and best known appliances for preventing the escape of fire; and that it was operated in a careful and skillful manner.

1. The evidence shows that at least three different kinds of smoke-stacks were in common use with locomotive-engines at the time of the fire. Defendant used two of these, known respectively as the "diamond stack," and "straight stack and front-end extension." It seems to be shown, if not conceded, that the kind last named was the best of those used by de-

defendant to prevent the escape of fire. As we understand the record, the kind used with the engine which is said to have caused the fire is not shown, but it seems to be assumed that it was the "diamond stack." After showing that less than one third of the engines used by defendant on its "I. & D." division, at the time of the fire, were equipped with the straight stack and front-end extension, the defendant offered to prove the style of stack used on the Illinois Central, Chicago, Milwaukee, and St. Paul, Chicago and Northwestern, Rock Island, and Burlington, Cedar Rapids, and Northern railways, and that, with the exception of a few straight stacks and front-end extensions on the Burlington, they were all diamond stacks. The court sustained an objection to the proffered evidence, and this ruling is assigned as error. We think it was correct. The question to be determined by the jury was, whether the engine in question set the fire, and if it did, whether it was properly constructed and operated, and in good condition. If it was properly made, and furnished with the required appliances to prevent the escape of fire, it was not material to show how other engines were constructed; and if it was not properly made, and was not furnished with suitable appliances, liability on the part of defendant could not be avoided by showing that it was made like most engines in use. It was the duty of defendant to use the best devices available to prevent the escape of fire: *Jackson v. Chicago etc. R'y Co.*, 31 Iowa, 178; 7 Am. Rep. 120; 2 Rorer on Railroads, 791. This duty would not depend, in any manner, upon the usage of other roads. A fault is none the less a fault because it is common: *Hosic v. Chicago etc. R'y Co.*, 75 Iowa, 683; 9 Am. St. Rep. 518; *Hamilton v. Des Moines V. R'y Co.*, 36 Iowa, 38. The proposed evidence would not have shown that defendant was free from negligence in using the engine in question, nor would it have tended to establish any fact material to the defense. It was, therefore, properly excluded.

2. It was shown that the Burlington company used the straight stack and front-end extension in October, 1886, on about one half of its engines. The court refused to give an instruction asked by defendant, as follows: "Evidence in reference to the adoption by the Burlington, Cedar Rapids, and Northern Railway Company of the 'front-end extension and straight stack' shows that even that company has not placed the same upon all its engines at the present time, and that no com-

pany, so far as the witnesses testifying on this subject know, has adopted and is using the same exclusively. This fact should be considered by you in determining whether or not the defendant has exercised proper diligence in adopting and using the same improvement, and if you find that no railroad has yet adopted and is using the same improvement exclusively, then you are warranted in concluding that the defendant is not negligent in failing to have adopted and placed the same in use exclusively upon its engines." The court, however, charged the jury as follows: "It is the duty of defendant to adopt and use the best-known and approved appliances for the prevention of the escape of fire from its engines used in the operation of its railroad; and when an invention or appliance has been tested, and generally approved as better than that already in use by it, it then becomes the duty of the defendant, with all reasonable diligence, to adopt and use said invention upon its engines; and it will not do for the defendant to neglect to do so until said invention has become in use by all other roads, unless, by the exercise of reasonable diligence, it could not sooner adopt and put in use the said improvements." This was more favorable to defendant, in some respects, than the instruction it asked, and covered in a general way the proposition made by defendant, so far as it was correct. But we are not prepared to hold that a railway company may defer adopting an important and necessary improvement until it has been adopted and is used exclusively by some other road.

3. Appellant complains of the refusal of the court to give the following instruction: "So long as defendant might reasonably use a single engine with the diamond stack, negligence could not be predicated on the fact that the engine that started the fire was a diamond stack instead of a front-end extension." This instruction ignores the fact that, so far as danger from fire is concerned, defendant might reasonably use engines with diamond stacks at some seasons of the year, and in some localities, without risk, and might be unable to use the same engines in other localities, or at other seasons of the year, without incurring risk. Other objections made to this instruction need not be considered. We think it was properly refused.

4. The defendant asked an instruction as follows: "The evidence in this case shows that what is known as the 'front-end extension and straight stack' is recognized by the Bur-

lington, Cedar Rapids, and Northern Railway Company as an improvement in the prevention of the escape of fire. But that is not sufficient. Before the defendant is bound to adopt or use the same, it must be generally recognized in railroad service as an improvement, and the mere fact that the Burlington, Cedar Rapids, and Northern railroad is adopting the same is not such evidence as would show that the defendant is negligent because it has not adopted and placed the same upon all of its engines." The evidence referred to was mostly given through the cross-examination of one of plaintiffs' witnesses by defendant. It was not given to sustain any theory contemplated by this instruction, and so far as we have discovered, no such theory was advanced in the case. We think the paragraph of the charge already quoted was fully as favorable to defendant on the duties imposed upon it by law as was the instruction refused, and we find no abuse of discretion on the part of the court in refusing to charge, especially in regard to the effect of the action taken by the railway company named.

5. Appellant insists that plaintiffs failed to prove title to a portion of the hay in question, and that evidence in regard to such title was improperly admitted. It appears that a portion of the hay was made from prairie-grass, which grew on land not owned by the plaintiffs. One of the plaintiffs testified that a portion of the hay destroyed was cut on land which he leased of one Edmunds. The latter testified that he had the handling and controlling of this land as agent, and had acted in controlling it and paying taxes on it for the owner since 1870; that he had leased it for the owner; and that he sold the hay on it, in 1886, to one of the plaintiffs. Defendant objected to the evidence of Edmunds, on the ground that it was an attempt to show an agency and transfer by an agent of an interest in real estate, and that the fact that Edmunds had paid taxes on the land, and looked after it, did not create such an agency as would authorize him to make a lease, for the reason that the growing grass was a part of the real estate. Without conceding the law to be as claimed by appellant, we would say that it was not shown that the grass was growing when sold. Plaintiffs did not enter upon the land as trespassers, but under, at least, a license. In this respect the case is different from the facts involved in *Lewis v. Chicago etc. R'y Co.*, 57 Iowa, 128, and *Murphy v. Sioux City etc. R'y Co.*, 55 Id. 474; 39 Am. Rep. 175. The agency of Edmunds,

the length of time he had controlled the land, and his sale to plaintiffs, authorize the presumption that their acts in entering upon the land and making the hay were rightful. We think the evidence in question was properly admitted: *Bulliss v. Chicago etc. R'y Co.*, 76 Iowa, 682.

6. We have examined the record with respect to other objections made by appellant, but do not find that any of them are well founded. The judgment of the district court is affirmed.

RAILWAY COMPANIES MUST USE well-tested and safe appliances and devices to prevent fire escaping from their engines: *Steinweg v. Erie etc. R'y Co.*, 43 N. Y. 123; 3 Am. Rep. 673; *Jackson v. Chicago etc. R'y Co.*, 31 Iowa, 176; 7 Am. Rep. 120; *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367; 4 Am. Rep. 688; but railway companies are not required to adopt new devices, and discard reasonably safe machinery, until the new appliances, by general use or otherwise, are shown to be superior: *Gulf etc. R'y Co. v. Walker*, 70 Tex. 126; 8 Am. St. Rep. 582, and note.

BROWN v. McCOLLUM.

[76 IOWA, 479.]

ELECTIONS — CONTEST BY WOMEN. — The enactment of a statute making women eligible to school offices repeals, by implication, so much of a former statute in force as requires the statement by a contestant that he is an elector. Women may therefore contest their right to an office to which they are eligible.

ELECTIONS — CONTEST — GROUNDS OF. — Section 697, Code of Iowa, providing that the contestant of an election must file his grounds of contest within twenty days after the canvass of the votes, does not prevent the contestant from afterwards amending such grounds of contest.

ELECTIONS — CONTEST — DISPUTED BALLOTS — INTENTION OF VOTER MUST GOVERN. — In ascertaining for whom disputed ballots were cast, the intention of the voter, as ascertained from the ballot itself, or from the ballot examined, and considered in the light of all the facts and circumstances developed at the trial, must be respected, and the ballot counted for whom the voter intended it; but if his intention is not apparent, or cannot be reasonably or fairly ascertained, then the ballot must be rejected.

ELECTIONS — CONTEST. — IN ASCERTAINING FOR WHOM A DISPUTED BALLOT WAS CAST, its language and form should be considered and construed in the light of all facts connected with the election, as the office to be filled, the names of the candidates voted for, and all other facts of which the voter may be presumed to have been advised, and in view of which he may have exercised his franchise; and if the intention of the voter is thus made apparent beyond a reasonable doubt, the ballot is sufficient, without regard to technical inaccuracies in its form.

ELECTIONS — CONTEST. — IN ASCERTAINING FOR WHOM A DISPUTED BALLOT was cast, if the voter's intention is found, such intention should not be defeated by the fact that the name of the candidate is misspelled, the wrong initials employed, or some other or slightly different name of like or similar pronunciation has been written instead of that of the candidate actually intended to be voted for.

ELECTIONS — CONTEST. — WHERE THE NAMES OF BOTH CONTESTANTS are found on a disputed ballot, one name printed and the other written, but neither erased or crossed off, the writing is presumed to express the intention of the voter, and will prevail over the printing, and such ballot must be counted for the person designated by the writing, and the printed name will be considered as erased. If, however, the voter has erased the written name, leaving the printed name unerased, the ballot must be counted as printed, and the name will be considered as erased if a line is drawn through it, though it is not wholly obliterated.

ELECTION — CONTEST — NAME WRITTEN ABOVE OR BELOW ITS PROPER PLACE. — In ascertaining for whom disputed ballots were cast, if one is cast for either of the parties to the contest for any other office than that for which he was nominated, it cannot be counted; but the mere fact that in writing his name on the ballot the voter has placed it slightly above or below its proper place on the ticket will not justify its rejection if it is apparent from the face of the ballot that the voter intended to cast it for the office in controversy.

ELECTIONS — CONTEST. — If a disputed ballot contains the name of either contestant, but does not fairly state or indicate the office such party is voted for, it must be rejected.

ELECTIONS. — THE COURT CANNOT, AS MATTER OF LAW, direct a finding as to any of the disputed ballots in a case of contested election. That question should be left to the jury, under proper instructions.

Nagle and Birdsall, for the appellant.

A. R. Ladd and F. W. Pillsbury, for the appellee.

ROTHROCK, J. 1. It is insisted by counsel for appellant that the plaintiff has no right to make the contest, because she is a woman, and not an elector. It is provided by section 697 of the code that the written statement of intention to contest an election shall set forth "the name of contestant, and that he is an elector of the county." He is also required to file a bond conditioned to pay costs in case his contest shall fail. The statement of contest, as made by the plaintiff, sets forth that she is an elector of the county. This is not the fact. She is a woman, and was not entitled to vote at a general election. But by section 1, chapter 136, Laws of Sixteenth General Assembly, it is provided "that no person shall be deemed ineligible by reason of sex to any school office in the state of Iowa"; and section 2 of the act provides that "no person who may have been or shall be elected or appointed to the office of county superintendent of common schools, or school

director, in the state of Iowa, shall be deprived of office by reason of sex." If the position of appellant be sound, a woman may lawfully be elected to the office, but she cannot assert the right to hold the office by means of the contest provided by law, because she is not an elector of the county. Section 692, which provides for the contest, was enacted when it was supposed that males were alone entitled to an election to office, and the qualification was that the person elected should be an elector of the county. It was essential, therefore, that the person making the contest should be an elector; for otherwise he would have no right to contest. The requirement that it must be set forth that the contestant is an elector of the county is manifestly for the purpose of showing that he is eligible to the office, and entitled to make a contest for it. The enactment of the statute, above cited, making women eligible to the office should therefore be held to be a repeal, by implication, of so much of the statute before that time in force as required the technical statement that the contestant is an elector. The true inquiry should be, Is the contestant eligible to the office? It is no answer to this position to say that the plaintiff should be required to assert her right to the office by *quo warranto* or some other proceeding. The legislative intent was to place the two cases on an equality, so far as the right to hold school offices is involved.

2. The plaintiff amended her grounds of contest after the twenty days within which she was required by section 697 of the code to file the written statement of contest. It is claimed that because that section of the law provides that the statement shall set forth the "particular causes of contest," there can be no amendment including other causes. This position is not tenable. The statute provides that the proceedings shall be assimilated to those in an action so far as practicable, and that the court of contest shall have all the powers of the district court necessary to the right hearing and determination of the matter, and that the statement shall not be dismissed for want of form, and that if any of the causes are held insufficient they may be amended: Code, secs. 702, 705. These provisions of the law plainly imply that the twenty days within which the statement must be filed does not operate as a statute of limitations, so as to prevent any amendment the plaintiff may think proper to make.

3. One of the grounds of contest was that illegal votes were cast at the election. The jury found that there were two

illegal votes, one of which was cast for the defendant. The person who cast the vote was one Robertson. It is so plain that he did not have the required residence in the county to be a lawful voter that we must omit a discussion of that question. The jury also found that no illegal vote was cast for the plaintiff. This finding of the jury cannot be disturbed, and we may say generally that we find no error in any of the rulings of the court upon the question of illegal votes.

4. The real question in the case arises upon twenty-five ballots which were found among those cast at the election. It was stipulated on the trial that, excluding the twenty-five contested ballots, there were cast at said election for said office 971 votes for J. R. McCollum, the incumbent, and 971 votes for Ella S. Brown, the contestant. The jury did not find a general verdict. They answered certain special interrogatories submitted to them by the court at the request of the defendant. By these answers they counted or allowed eleven of the contested ballots to the incumbent, and twelve to the contestant, and rejected two as having been cast for neither of the parties. The result (counting out the illegal vote cast by Robertson for the incumbent) was the election of the plaintiff by two majority. The twenty-five ballots in dispute were all printed. They contained the names of candidates for all the state and county officers voted for at that election. The name of the plaintiff was printed on fifteen of the ballots as the candidate for superintendent of schools, and the name of the defendant was printed on ten of the ballots for the same office. The contest arises over the erasure of the name printed upon the tickets, and the writing of the name of the opposing candidate in its place, or on the margin of the ticket. This writing was all done in pencil, and the lines are heavy, and the writing of a very indifferent order. The erasures in some instances are very dim, and on one or two of the tickets it appears, not by lines drawn through the name, but as though there had been lines, and an attempt made to rub them out. It is impossible to describe the tickets as they appear. Each of the parties have endeavored to reproduce them in printed abstracts, and the clerk of the district court, in a transcript, used printed tickets, and attempted to make erasures and interlineations like the original. These attempts at copying all fail to exactly present the tickets as they are. The original tickets were used upon the trial in the court of contest, and they were submitted to the jury in the district court. and have

been certified to this court. The defendant was the regular nominee of the Republican party for the office. The plaintiff was an independent candidate, but was voted for by the Democratic party. It does not appear that there was any other candidate for the office. The name of the plaintiff is printed on some of the ballots as Ella S. Brown, and on others as Miss Ella Brown. In erasing the name of McCollum and writing that of Brown, in some instances, no christian name is written,—it is simply “Brown.” In some of the tickets where her name is erased and the defendant’s name is written, the christian name of the defendant is also omitted. The jury counted these ballots for the party whose name was thus written. On other tickets, the initials “J. B.” instead of “J. R.” precede the surname McCollum, and in writing the name of the plaintiff, some are as follows: Mrs. A. Brown, Ella Brown, Miss Emma Brown, and Elice Brown. All of these ballots were counted for the plaintiff. It does not appear that there was a Mrs. Brown in the county. There was a Miss Emma A. Brown, who was a visitor in Clarion at the time of the election. She came from another state in September previous. But the vote for Miss Emma Brown was cast in Blaine township, some distance from Clarion.

We have stated these facts because the defendant requested the court to instruct the jury that some of these ballots could not be counted for the plaintiff, not only because of the difference in name, but because the written name was not under nor opposite to the designation of the office. All of these instructions were refused, and the court instructed the jury upon these questions as follows: “There have been submitted in evidence, for your inspection, twenty-five ballots which were cast at said election, and it will be your duty to find and determine, from the ballots themselves, and from the evidence under the law as given in this charge, for which of the parties to this contest, if for either, each of said votes was cast. The intention of the voter, if it can be ascertained from the ballot itself, or from the ballot examined and considered in the light of all the facts and circumstances developed in the trial, should be respected, and the ballot counted for the person for whom the voter intended it. If, however, the intention of the voter is not apparent, or if it cannot be reasonably and fairly ascertained under the evidence in the case, then such ballot should be rejected altogether. If the ballot expresses the intention of the voter beyond a reasonable doubt, it is sufficient, with-

out regard to technical inaccuracies in the form of the ballot. The language and form of the ballot should be considered, and construed in the light of all the facts connected with the election; as, for instance, the office to be filled, the names of the candidates voted for, and all the other facts of a general public nature surrounding the election, of which the voter may be presumed to have been advised, and in view of which he may be presumed to have expressed his franchise. If, from an inspection of the ballot, and from all the facts surrounding the same, and surrounding the election at which such ballot was cast, you can find and fully satisfy yourself of the voter's intention, such intention should not be defeated or frustrated by the fact that the name of the candidate is misspelled, or the wrong initials were employed, or some other or slightly different name of like or similar pronunciation or sound has been written instead of the real candidate actually intended to be voted for. Several of the disputed ballots in this case contained names more or less similar to those of the parties to this contest. These names are variously spelled, are accompanied or distinguished by various initials, while others are without any expressed christian name, and on still others, the christian name made use of by the voter is not the real christian name of the party claiming the benefit of such vote. Still other names are imperfectly and somewhat blindly and illegibly written. All such votes should be carefully and fairly considered and examined, as directed in the charge, and if therefrom you find it fairly and reasonably apparent that said ballots, or any of them, were intended for either of the parties to this contest, then you should so count them. If not so intended, or if the intention of the voter in any particular case cannot be fairly and reasonably ascertained, then such ballot should be rejected, and counted for neither party. On some of the ballots submitted to you will be found the names of both the parties to this contest,—one being printed and the other written thereon, neither being erased or crossed off. In such cases, the writing will be presumed to express the intention of the voter, and will prevail over the printing, and such ballot will be counted as cast for the person designated by the writing, and the printed name will be considered as erased. If, however, after writing the name of the candidate on the ballot, the voter has erased it, leaving the printed name unerased, it must be counted as printed. A name will be considered erased if a line be drawn through it, even though it be not

wholly obliterated. A vote cast for either of the parties to this contest for any other office than superintendent of schools cannot be counted for such party in this proceeding; but the mere fact that, in writing the name on his ballot, the voter has placed it slightly above or below its proper place on the ticket will not justify you in rejecting such ballot, if it be apparent from the face thereof that he in fact intended to cast such vote for the office in controversy. If the ballot, in any instance, contain the name of either party, but does not fairly state or indicate the office such party is voted for, you will reject it altogether." We regard these instructions as eminently fair to the parties. They embody the law as found in McCrary on Elections, sections 508 and 509, and elsewhere, and find support in the leading case of *People v. Saxton*, 22 N. Y. 309; 78 Am. Dec. 191.

Counsel for appellant contends that the rule adopted by the court, that the written name should prevail over the printed one where the latter is not erased, is erroneous, and that the rule applies only where it appears that the voter himself wrote the name. We think the later rule is, that it should be presumed that the voter fixed and altered the ticket, or procured another to do it for him. Again, it is claimed that where both names appear without erasure, the one first in order should be counted, and section 625 of the code is cited in support of the position. The section is plainly intended to apply where more than one officer is to be elected to the same office, as in case of two or more justices of the peace, railroad commissioners, or the like. In conclusion, we have to say that we find no error in the rulings, nor in the instructions of the court to the jury. We do not think that the court should have, as matter of law, directed a finding as to any of the disputed ballots; and after a careful examination of them, we think the jury were fully warranted, from the evidence, in answering the special interrogatories as they did.

Affirmed.

ELECTIONS. — In cases of disputed ballots, the intention of the voter must govern, when it can be ascertained; and such intention may be inferred from the voter's acts: *People v. Saxton*, 22 N. Y. 309; 78 Am. Dec. 191, and note; or from the circumstances surrounding the election: *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250. But a perfect ballot is the best and generally the exclusive evidence of the voter's intent, and it is only when a ballot is imperfect or ambiguous that extrinsic evidence can aid in ascertaining the intent of the voter: *Wimmer v. Eaton*, *supra*; *Hartman v. Young*, 17 Or. 150;

11 Am. St. Rep. 787, and extended note; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, and note.

BALLOTS WITH ONE NAME PRINTED AND ANOTHER WRITTEN THEREON. — Where a ballot discloses a name written opposite to a printed name, which has been erased, the voter is presumed to have intended to vote for the candidate whose name was written: *Fenton v. Scott*, 17 Or. 189; 11 Am. St. Rep. 801; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349; *People v. Saxton*, 22 N. Y. 309; 78 Am. Dec. 191.

BALLOTS — IRREGULARITIES IN SPELLING, INITIALS, ETC. — A ballot designating the candidate by his initials only, or leaving out a syllable from any material part of his name, is fatally defective: *People v. Cicott*, 16 Mich. 283; 97 Am. Dec. 141, and note; *People v. Higgins*, 3 Mich. 233; 61 Am. Dec. 491, and note; but see *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349; *Gamm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312, and extended note.

ELECTIONS — QUESTIONS FOR JURY. — Where, in response to an inquiry from the jury as to their right to pass upon the legality of certain votes, the judge answered in the negative, and advised them that they should take and act upon the law as laid down, in this advisory action of the judge, there was no error: *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767.

JACOBS v. SNYDER.

[76 IOWA, 822.]

NOTICE OF FRAUD FROM RECORD OF DEED. — STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN until the actual discovery of a fraud, and hence an action is not barred in five years from the date of the recording of the deed, in a case where an action is brought to cancel a decree of foreclosure and the deed obtained thereunder, on the ground of fraud in obtaining the decree in violation of an agreement to dismiss the foreclosure proceedings, and in securing judgment for the mortgage debt after nearly the whole of it had been paid, and then by concealing from the mortgagor the fact that the decree of foreclosure and the deed had been made, obtaining from the latter the remainder of the amount of the mortgage; the mortgagee thus taking advantage of the ignorance of the mortgagor, whose confidential adviser he was, and making no demand for the possession of the property until the last payment had been made, the mortgagor all this time paying the taxes and making improvements on the property.

Wishard and Bailey, and A. W. Osborne, for the appellant.

Parker and Richardson, and O. Rice, for the appellees.

ROTHROCK, J. It is averred in the petition, and in an amendment thereto, in substance, that the plaintiff was the owner of a farm of eighty acres in Dickinson County, and that in the year 1875 she executed a mortgage thereon to the defendant Marcus Snyder, to secure the payment of four prom-

issory notes, amounting in the aggregate to \$342. Said notes became due at different times. The last one matured December 22, 1878. On the 29th of July, 1878, Snyder commenced an action to foreclose the mortgage, and personal notice of said suit was served on the plaintiff in Green County. After suit was commenced, an agreement was made between plaintiff and said Snyder that the suit should be dismissed, and at that time the plaintiff had fully paid all the notes, and interest thereon then due, and the plaintiff returned to Green County. In the face of this agreement, and in direct violation thereof, the defendant Snyder made his appearance at the next term of court, and presented the notes and mortgage to the court, and concealed the fact that said suit had been settled; and a judgment was rendered on said notes, and a decree entered foreclosing the mortgage. Afterwards, in October, 1878, Snyder caused special execution to issue on the judgment and decree, upon which the land was sold at sheriff's sale to Snyder, who assigned his certificate of purchase to his wife, Oceana Snyder, and a sheriff's deed was made to her in October, 1879. By reason of the fraudulent concealment of said Marcus Snyder, the plaintiff did not discover that a judgment and decree had been rendered, and the land sold thereon, until January, 1884. The fraudulent concealment consisted in receiving payments from the plaintiff upon the indebtedness, from time to time, without informing the plaintiff that any judgment and decree had been rendered, and the last of said notes was paid in the year 1883. The plaintiff is a German, and unable to read or write in her own or any other language; and from the time the mortgage was given, up to January, 1884, when she discovered the fraud of Snyder, he was her confidential adviser, and she relied upon him for advice and counsel, and he transacted all her business, and was thus enabled to take advantage of her confidence and her ignorance. To further conceal his fraudulent acts, he made no claim to the possession of the land up to January, 1884, and permitted plaintiff to pay the taxes and make improvements thereon. When plaintiff discovered the fraud, in January, 1884, she demanded a deed reconveying the land to her. Snyder promised to make the deed to her, but instead of doing so, he and his wife made a deed to the defendant Minnie Jacobs, and took a mortgage from her for six hundred dollars, without the knowledge of the plaintiff. It is demanded that the judgment and decree and the deeds and the mortgage

be set aside and canceled, and the title quieted in the plaintiff.

If the averments of this petition are true, the defendant Marcus Snyder, by receiving the plaintiff's money in successive payments for years after he had foreclosed the mortgage, was guilty of a crime. It appears to be conceded in argument that under the averments of the petition the plaintiff had a right of action for five years after the discovery of the fraud. The sheriff's deed was recorded in 1879, and action was not commenced for more than five years from that time. Counsel for defendants claim that where the fraud complained of is shown by a deed duly recorded, notice of the fraud is conclusively presumed from the date of the record; and they cite the cases of *Humphreys v. Mattoon*, 43 Iowa, 556; *Bishop v. Knowles*, 53 Id. 268; *Gebhard v. Sattler*, 40 Id. 152; and *Laird v. Kilbourne*, 70 Id. 83. The facts in the cited cases are quite different from those in the case at bar. In this case, if the averments of the petition are true, there was an abuse of confidence by Snyder, and actual concealment that he had procured a decree, sale, and deed. He not only concealed it from the plaintiff, but he intensified his fraud by contriving to receive payments on the debt long after the deed was recorded. We think the demurrer should have been overruled.

Reversed.

LIMITATION OF ACTIONS — FRAUD. — The statute of limitations generally begins to run in cases of fraud only from the time of discovering the fraud, or from such a time as it could or ought to have been discovered by reasonable diligence: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587; *Wilder v. Secor*, 72 Iowa, 161; 2 Am. St. Rep. 236, and note; *Snodgrass v. Branch Bank*, 25 Ala. 161; 60 Am. Dec. 505, and extended note 511-515; *Scruggs v. Decatur etc. Land Co.*, 86 Ala. 173; *Woods v. James*, 87 Ky. 511; *Humphrey v. Carpenter*, 39 Minn. 115; *Heflin v. Ashford*, 85 Ala. 125; but in Kentucky, after ten years from the perpetration of the fraud, no action can be brought to set aside a conveyance for alleged fraud, no matter when the fraud was discovered: *Fritschler v. Koehler*, 83 Ky. 78. A plaintiff who claims the suspension of the running of the statute must always affirmatively allege the facts in relation to the discovery of the fraud: *Humphrey v. Carpenter*, 39 Minn. 115.

BARRETT v. FISCH.

[76 IOWA, 532.]

CHATTEL MORTGAGES — DESCRIPTION OF PROPERTY IN. — The record of a chattel mortgage which recites that the property mortgaged is "one sorrel horse three years old," and then further recites that the mortgagor is a resident of a certain county, and in case of foreclosure the property is to be sold in that county, is insufficient to impart constructive notice to third persons.

CHATTEL MORTGAGES — BURDEN OF PROOF RESPECTING NOTICE OF. — In an action by a purchaser from the mortgagor against the mortgagee of personal property, where the defendant depends upon the theory that his right to the property depends upon whether the record of the mortgage imparts constructive notice, the burden of proof is not on plaintiff to show that he did not have actual notice of the mortgage when he purchased the property.

George W. Hewitt, for the appellant.

O. M. Barrett and S. A. Callvert, for the appellee.

REED, C. J. Plaintiff purchased the property in question, which is a horse, from John K. Rothaermel. Defendant claimed under a chattel mortgage executed by Rothaermel before the sale to plaintiff. The description in the mortgage is, "one sorrel horse three years old." The instrument recites, however, that the mortgagor was a resident of Sioux County, and provides that in case of foreclosure the property shall be sold in that county. The district court ruled that the record of the mortgage did not impart constructive notice, and directed a verdict for plaintiff. It has frequently been held by this court that the record of a mortgage containing a description similar to that in question was not constructive notice to creditors or subsequent purchasers of the rights of the mortgagee: *Caldwell v. Trowbridge*, 68 Iowa, 150; *Rhutasel v. Stephens*, 68 Id. 627; *Barr v. Cannon*, 69 Id. 20. It was contended, however, that the recital as to the mortgagor's place of residence, and the provisions as to the place of sale, were sufficient to suggest an inquiry, which, if followed, would have led to the identification of the property intended to be covered by the mortgage. But this position cannot be sustained. It could be understood from the recital, perhaps, that the mortgage was intended to cover property in Sioux County. But knowledge of that fact would not aid one who was seeking information as to the particular property intended. Aided by the recital, the description is simply of a sorrel horse three years old, in Sioux County, which is as indefinite as that given in express terms in the mortgage.

It was contended, however, that as the mortgage was valid as between the parties to it, the burden was on plaintiff to prove that he did not have actual notice of its existence when he made the purchase of the property, and that as he did not introduce evidence of that fact, the verdict should have been the other way. The case was tried, however, upon the theory that defendant's right depended upon whether the record of the mortgage imparted constructive notice. He alleged that his mortgage was duly recorded before plaintiff's purchase; thus clearly indicating that he relied upon the record as notice of his interest. We think the court below was correct in the view that no issue as to actual notice was presented by the pleadings.

Affirmed.

SUFFICIENCY OF DESCRIPTION OF PROPERTY IN CHATTEL MORTGAGE. — In treating of what are necessary elements of the description of property in a chattel mortgage, it may be stated that a description which may be amply sufficient as between the immediate parties to the mortgage will, in many cases, not be sufficient as against creditors of or purchasers from the mortgagor.

It does not seem to be necessary that the property be so described that it can be absolutely identified by the descriptive words or by the name used to identify it. In fact, it is utterly impossible, in the great majority of cases, to set forth in the mortgage all the articles embraced therein with such absolute precision that any person, by a mere inspection of the document, without reference to any other source or method of information, could identify them with certainty. Resort must, most generally, be had to parol evidence to identify the property enumerated, though it may be minutely described. The only general rule deducible from the numerous authorities is, that the description in a chattel mortgage must contain some hint which will direct the attention of those reading it to some source of information beyond the words of the parties to it, or to something which will enable third persons to identify the property, aided by inquiries which the mortgage indicates and directs, or some description which distinguishes the property from other similar articles: *Rhutael v. Stephens*, 68 Iowa, 627; *Smith v. McLean*, 24 Id. 322; *Winter v. Landphere*, 42 Id. 471; *Golden v. Cockril*, 1 Kan. 259; 81 Am. Dec. 510; *Yant v. Harvey*, 55 Iowa, 421; *Price v. McComas*, 21 Neb. 195; *Wiley v. Shars*, 21 Id. 712-716; *Tompkins v. Henderson*, 83 Ala. 391; *Tindall v. Wasson*, 74 Ind. 495; *Lawrence v. Everts*, 7 Ohio St. 194; *Mills v. Kansas Lumber Co.*, 26 Kan. 574; *Tootle v. Lyster*, 26 Id. 589; *Gurley v. Davis*, 39 Ark. 394; *Griffiths v. Wheeler*, 31 Kan. 17; *Tolbert v. Horton*, 33 Minn. 104; *Stonebraker v. Ford*, 81 Mo. 532; *State v. Cabanne*, 14 Mo. App. 294; *Kimball v. Sattley*, 55 Vt. 285; 45 Am. Rep. 614.

When applying this rule in *Wiley v. Snyder*, 34 Mich. 60, Chief Justice Cooley said: "But if a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which

would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect, the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as they may be needful to his protection, and he purchases in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of the bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defense to be set up by him to the mortgage, that, being a stranger, he discovered no such name on or about the bull, and therefore could not, in fairness, be bound by a mortgage which undertook to identify the animal by the name. Descriptions do not identify by themselves; they only furnish the means of identification. They give no certain marks or characteristics, perhaps historical *data* or incidents, by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject-matter which they had at the time."

So in *Mills v. Kansas Lumber Co.*, 26 Kan. 578, Valentine, J., delivering the opinion of the court, said: "We think, under the circumstances of the case, the description of the property in the chattel mortgage is sufficient. Of course, the description in the mortgage is not sufficient to enable a third person, without the aid of other facts than those contained in the mortgage, to identify the horse; but that is not necessary. A description which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficient. Indeed, personal property can seldom be so described in any instrument as to enable a stranger to select it from other property of like kind without the aid of other facts than those mentioned in the instrument itself. The name of the horse in the present case was 'George'; but there may have been several other horses in the same county by the same name; and a stranger could not tell, without inquiry, what this horse's name was, or whether it was one of the horses whose name was George or not. Resort must be had, in nearly all cases, to other evidence than that furnished by the mortgage itself to enable third persons to identify mortgaged property; and generally, where there is a description of the property mortgaged, and the description is true, and, by the aid of such description and the surrounding circumstances, the third person would, in the ordinary course of things, know the property was mortgaged, the description should be held to be sufficient. In the present case, the defendant Mills was bound to take notice of the mortgage, for it had been properly recorded. He was bound to know that a bay horse, six years old in 1878, owned by and in the possession of John G. Raner, was mortgaged. We think that he was bound to know, from the mortgage itself, that the property was situated in McPherson County on November 2, 1878, when the mortgage was executed, and, by inquiry, he could have ascertained that this was the only bay horse which Raner either owned or possessed, and that he

owned and possessed the same in McPherson County; and he knew when he attached this property that he attached it in McPherson County, and as the property of Raner, and that it was mortgaged. Under such circumstances, we think, as between the mortgagee, the Kansas Lumber Company, and the defendant Mills, we must hold that the description was and is sufficient."

As is shown by this last case, it is important to state in the mortgage the locality where the mortgaged property may be found. Such description often renders a mortgage, otherwise indefinite and uncertain, sufficiently certain by making the mortgage itself indicate where the property may be found on inquiry. Thus where the description is "fifty head of steers, about (20) months old, now owned by me, and in my possession on my farm in Independence township, Jasper County, Iowa," such description is sufficient as against subsequent purchasers from the mortgagor, even though one of the purchasers bought some of the cattle in another township, where they were in charge of the agent of the mortgagor on a part of his farm, which lay partly in both townships: *Kenyon v. Tramel*, 71 Iowa, 693. So where the property is described as "one bay horse, eight years old, of a certain weight," and the mortgage stated that the mortgagor, who resided in the county, was "lawfully possessed of said goods and chattels," it was held that such mortgage was sufficient to put a purchaser on inquiry: *Peters v. Parsons*, 18 Neb. 191. Thus where the mortgaged chattels are described as "one bay horse, seven years old," of a certain weight, and "one bay mare," weighing a certain number of pounds, it was held that such description, together with the provision that the property was to remain in the hands of the mortgagor, was sufficient, from the record, to give notice to third parties: *Wheeler v. Becker*, 68 Iowa, 723. And a description of the property as "one bay horse named Billy, ten years old last spring, and one one-seated buggy, and one set of single harness, all of which is in my possession, and clear of encumbrance," the mortgage showing that the mortgagor resided in a certain county, and providing against the removal of the property from that county, is sufficient: *Brock v. Barr*, 70 Id. 399. A mortgage on certain logs then in a place designated, and on certain other logs to be cut by the mortgagor on land described, and to be placed with the former within a time specified, is a sufficient description of the property: *Boykin v. Rosenfield*, 69 Tex. 115. So where the property is designated as "the dry goods, carpets, hats, caps, clothing, notions, gentlemen and ladies' furnishing goods, queen's-ware, groceries, and all other goods, wares, and merchandise, . . . and also all of the wool, rags, feathers, and other country produce, and all of the show and display cases, and store furniture and fixtures, and gas-fixtures, and all other property of whatever kind," situated in a certain storeroom and cellar in a certain block on a certain side of a certain street, in a designated city, in a county and state named, the description is sufficient: *Muncie Nat. Bank v. Brown*, 112 Ind. 474. A mortgage describing the property as a flock of six hundred head of sheep, consisting of wethers, ewes, and lambs, with their increase for the year 1882, owned by and in the possession of the mortgagor, in Linn County, Kansas, is not void because of any insufficiency in the description: *Corbin v. Kincaid*, 33 Kan. 649. So where the property was described as twenty-three head of horses and mules, all situated on their range on the South Loup River, all the above-described property being in the mortgagors' possession, and owned by them, and the range named was shown to be situated in a certain county, where the mortgage was recorded, and that the property named was all of the kind owned by the mortgagors, the description was held sufficient: *Wiley v. Shars*, 21 Neb. 712. On the

other hand, it may be stated that, though the mortgaged articles or property are otherwise sufficiently and definitely described, the mortgage will be insufficient if there is no reference to ownership, location, or anything else enabling third persons by inquiry to identify them: *Rhodes v. Stephens*, 68 Iowa, 627; *Warner v. Wilson*, 73 Id. 719; *Grimes v. Cannell*, 23 Neb. 187; *Tabor v. Sampeon*, 7 Col. 427.

As was said in the beginning, a description which is sufficient between the parties to the mortgage may be utterly insufficient as against third persons; for, as between the parties, a specific and particular description is not necessary, and the mortgaged articles may be shown by parol evidence, while the mortgage, to be effectual as against third persons, must point out the subject-matter of it, so that such persons by it, together with such inquiries as the instrument suggests, may be able to identify the property intended to be covered: *Tindall v. Wasson*, 74 Ind. 495; *Cass v. Gunnison*, 58 Mich. 108; *Tootle v. Lyster*, 26 Kan. 589; *Gurney v. Davis*, 39 Ark. 394. Under this rule the following descriptions have been adjudged insufficient: "Two mule colts, one year old next spring": *Tindall v. Wasson*, 74 Ind. 495; "forty head of cattle, of different ages and sexes, most of them thoroughbreds": *Stonebraker v. Ford*, 81 Mo. 532; "one oscillating thrasher, size 6, thirty-inch cylinder, and also one Chicago Pitta, ten horse-power": *Hayes v. Wilcox*, 61 Iowa, 732; "ten head of two-year-old past steers, valued at thirty-five dollars per head": *Price v. McComas*, 21 Neb. 195. Where the mortgage described the animal intended to be covered as having four white feet, when in fact it had but one white foot to the pastern joint, and there was a little white on another foot, the description was held insufficient to make the recording of the mortgage constructive notice: *Rowley v. Bartholomew*, 37 Iowa, 374. And the record of a mortgage of two cows which fails to include their increase will not defeat the sale of such increase when the calves are eighteen months old: *Winter v. Landphere*, 42 Id. 471. A mortgage of "our entire stock of dry goods, boots, shoes, hats, clothing, and notions, and such other goods as are usually kept in a first-class country store," is not a sufficient description: *Joffrey v. Brown*, 29 Fed. Rep. 476. A description of the mortgaged property as "one open buggy, with fills new, made by Taylor Brothers, Emmetsburg, and bought of them, and one sulky, new, made by Taylor Brothers, Emmetsburg, Iowa," is not definite enough to impart notice to third persons by the record of the mortgage: *Ormsby Bros. & Co. v. Nolan*, 69 Iowa, 130. So a description of a mule, sought to be mortgaged, as "a light bay mule," when in fact it is a light gray mule, is fatally defective: *Bowman v. Roberts*, 58 Miss. 126.

A mortgage which describes the property as "one bay mare, two mare mules, one horse mule," does not sufficiently specify the property as to impart notice by its record to a *bona fide* purchaser from the mortgagor of one black horse mule nine years old, and one black mare mule four years old, that the mules mortgaged and those purchased were the same, especially as the mortgagor had mules on several places: *Stewart v. Jaques*, 77 Ga. 365; 4 Am. St. Rep. 86; and the same rule applies as to an attaching creditor, where the property is described in the mortgage as "sixty head of hogs": *Everett v. Brown*, 64 Iowa, 420; or where it is described as "sixty head of two and three year old steers, and forty head of yearling steers": *Caldwell v. Troubridge*, 68 Iowa, 150.

A description in a mortgage, which would otherwise be insufficient, is often rendered sufficiently definite by proof that the property named is all of that particular kind owned by the mortgagor. Under this rule, the fol-

lowing descriptions have been held sufficient: "One bay mule," when, in fact, the mule was black: *Harris v. Woodard*, 96 N. C. 232; "one horse": *Spivey v. Grant*, 96 Id. 214; "two horses belonging to the mortgagor": *Brooks v. Aldrich*, 17 N. H. 443; "ten horses in the possession of the mortgagor": *Eddy v. Caldwell*, 7 Minn. 225; a "dark bay mare": *Burns v. Harris*, 66 Ind. 536. Where, however, the horse mortgaged is traded by the mortgagor for another horse of a different color, with the consent of the mortgagee, such description is not good as against a third party without notice: *Sharpe v. Pearce*, 74 N. C. 600. "Eleven Smith farm-wagons" has been held a sufficient description under the above rule: *Clapp v. Trowbridge*, 74 Iowa, 550. So where a horse is described by age and color, and as being in the possession of the mortgagor: *Williams v. Crook*, 63 Miss. 9; and where the description was, "one bay horse, seven years old, weight 1,150, one bay mare, nine years old, weight 1,250": *Wheeler v. Becker*, 68 Iowa, 723; and also "forty-one Berkshire hogs, and sixty-five grain-sacks": *Knapp v. Deits*, 64 Wis. 31; also "all the stock, goods, and chattels of every kind and name," in a store named: *Shaw v. Glen*, 37 N. J. Eq. 32. So where the property was misdescribed as "three four-year-old horses," and the evidence showed that three horses three years old, coming four, were meant: *Tolbert v. Horton*, 33 Minn. 104. Under the same conditions, where the description used is "one black mule, about eight years old," and the complaint is for a dark-colored mule: *Connally v. Spraggins*, 66 Ala. 258; and again, where the descriptive words used are, a "black mare mule," while the one sued for is described by witnesses as a dark mouse-colored mare mule: *Tompkins v. Henderson & Co.*, 83 Ala. 391. A description of the property as "two brown mules, aged eight and twelve years," has been held sufficient, under the rule above enumerated: *Schmidt v. Bender*, 39 Kan. 437; and so has a mortgage of "thirty head of cattle, three horses, and two mules": *Kelly v. Reid*, 57 Miss. 89.

It may be stated as a general rule that a mortgage of a specified number of articles out of a larger number is not good as against creditors of the mortgagor or others acquiring adverse rights, unless it furnishes the *data* for separating the mortgaged property from the mass of articles: *Kelly v. Reid*, 57 Miss. 89; *Fowler v. Hunt*, 48 Wis. 345; *Bullock v. Williams*, 16 Pick. 33; *Crowell v. Allis*, 25 Conn. 300. Thus a mortgage is insufficient where it describes the property as "the entire stock in trade and fixtures" of the mortgagee, "consisting of clocks, watches, chains, show-cases, jewelry, and all goods included in his stock, tools, and materials, excepting" certain articles "to the amount of two hundred dollars": *Fowler v. Hunt*, 48 Wis. 345. So a mortgage of "one hundred thousand feet of white-pine saw-logs, now on the North Branch, so called, of Thunder Bay River," without any *data* to separate, distinguish, or identify them from a very much larger number of logs belonging to the mortgagor in the same river, is void for uncertainty, as against third parties who have acquired rights: *Richardson v. Alpena Lumber Co.*, 40 Mich. 203; and to the same effect *Cass v. Gunnison*, 58 Id. 106. And a mortgage by the maker of "ten new buggies," without any further description to separate them from fifteen buggies of the same kind and by the same maker, and without delivery of possession, is an insufficient description: *Blakley v. Patrick*, 67 N. C. 40; 12 Am. Rep. 600. So a mortgage of "one hundred and twenty-four head of mules now in the territory of Kansas," and "one pair of clay-bank horses," without any other description, is void for uncertainty, as it does not distinguish the property from other similar property, or enable third persons to identify it by inquiry: *Golden v. Cockril*, 1 Kan. 259; 81 Am.

Dec. §10. So a mortgage of an enumerated number of bushels of grain out of a larger quantity, all of which is not uniform as to quality, nor in the possession of the mortgagor, the description in the mortgage not giving any data by which the part intended to be mortgaged can be separated or distinguished by third parties from the remainder, is void for uncertainty: *Clark v. Voorless*, 36 Kan. 144; *Sanders v. Voorless*, 36 Id. 136. A mortgage of "forty head of cattle of different ages and sexes, most of them thoroughbreds," is void for indefiniteness, if it is shown that the mortgagor has a larger number of cattle of the same kind: *Stenbraker v. Ford*, 81 Mo. 523.

A mortgage of a certain number of steers of a designated age, and now on a farm named, is void for uncertainty, where it is shown that the mortgagor possessed a much larger number of steers on the same farm, and nothing was given in the description by which the steers intended to be mortgaged could be separated from the whole number owned by the mortgagor; and the fact that certain steers had been separated from the band, and claimed under the mortgage, will not avail against an attaching creditor of the mortgagor, in the absence of proof of an agreement that the mortgage should apply to such steers when it was executed: *Price v. McComas*, 21 Neb. 195. Where, in describing the property mortgaged, exception is made of such as is exempt from execution, such exception will avoid the whole mortgage, if the description specifically covers all the articles owned by the mortgagor: *Fowler v. Hunt*, 48 Wis. 345. But such exception of exempt property will not apply to the property particularly described, when it may apply to other property not so described. Thus where the mortgage described specifically certain property, and the mortgage then included "other personal property, except therefrom such as is exempt from execution," the exception was held to apply to the "other personal property": *Giddey v. Uhl*, 27 Mich. 93. Any definite provision in the mortgage for separating the specified articles from the mass of other articles of like kind will render the mortgage valid and sufficient. Thus a mortgage of saw-logs described as the northerly one million two hundred and fifty thousand feet lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs, and counting along the stream, until the requisite number should be counted and set apart, is valid as to execution creditors of the mortgagor. It is said that in such case it is not necessary to separate the logs mortgaged by a boom or artificial boundary, as any one skilled in measuring logs could, from the description, ascertain certainly the logs mortgaged: *Merchants' etc. Bank v. McLaughlin*, 1 McCrary, 258.

A mortgage will generally convey all the articles ascertainable from the description, but as to other articles it will be void; so held where the mortgage described certain specified articles as being in a certain building; and it was shown that there was a less number of the articles there than the mortgage called for: *Croswell v. Allis*, 25 Conn. 301. The mention of a specific number of articles of a certain kind does not prevent the conveyance of other articles of the same kind, under a general description: *Harding v. Coburn*, 12 Met. 333; 46 Am. Dec. 680; *Welsh v. Lewis*, 71 Ga. 387. A provision for the delivery of specific articles of the property may serve as a means of identifying and separating them from other like property, or a defective description may be cured by delivery of the property to the mortgagee before the rights of third parties have attached: *Parsons Sav. Bank v. Sargent*, 20 Kan. 576; *Frost v. Citizens' Nat. Bank*, 68 Wis. 234. Where the location of part of the mortgaged property is misdescribed, this will not vitiate it, if such part can be identified by proof: *Goff v. Pope*, 83 N. C. 123; *Spaulding v. Mosier*, 57 Ill. 148; *Hunt v. Shackelford*, 56 Miss. 397.

Where the description is wholly false and incorrect, the mortgage is ineffectual as against third persons acquiring adverse interests: *Adams v. Commercial Nat. Bank*, 53 Iowa, 491. But where the description is only partially untrue, the mortgage is not thereby rendered wholly void, if the descriptive part which is correct does not apply to other property of like kind, and such description reasonably identifies the property: *Tolbert v. Horton*, 33 Minn. 104; *King v. Aultman*, 24 Kan. 246. In such case, the false part of the description may be rejected altogether: *Dodge v. Potter*, 18 Barb. 198; *Pettis v. Kellogg*, 7 Cush. 456. As a general rule, property not fairly within the description contained in the mortgage will not pass under it, nor is parol evidence admissible to show that property not specifically embraced in the description was intended by the parties to be included therein: *Hutton v. Arnett*, 51 Ill. 198; *Hunt v. Bullock*, 23 Id. 320; *Van Buren v. Davis*, 51 Iowa, 637. Thus a mortgage of the "groceries" contained in a country and village grocery store does not include pails, shovels, and the like, although such goods are usually kept in such stores: *Fletcher v. Powers*, 131 Mass. 333. Nor will a mortgage of the "goods in his store" convey a safe kept in the store for the mortgagor's private use: *Curtis v. Phillips*, 5 Mich. 112. *Contra*, *McCall v. Walter*, 71 Ga. 287, where a mortgage of the stock and fixtures and utensils in a country store was held to pass an iron safe, show-cases, scales, copying-press, and chandeliers in the store. Still a mortgage of "all the desks, chairs, trunks, and office furniture in" a certain office was held to pass an iron safe then in use there: *Shoshongan Bank v. Farrar*, 46 Me. 293. A mortgage on the "fixtures, furniture, and appliances used in and about the carrying on" of a certain store does not include wagons and teams employed by the mortgagor in the delivery of goods from the store: *Van Patten v. Leonard*, 55 Iowa, 520. But the mortgage of a foundry, "with all the working implements, machinery, and tools connected therewith, now thereon," will include patterns. A mortgage of a stock of goods, and such additions thereto as the mortgagor may from time to time make, conveys only the stock on hand at the date of the mortgage: *Wagner v. Watts*, 2 Cranch C. C. 169. So a mortgage of the "goods and chattels now in" a certain store, "a schedule of which is hereunto annexed," conveys only the goods then in the store and included in the schedule: *Partridge v. White*, 58 Me. 564. A mortgage of all of the property or stock in trade of the mortgagor in a store or shop occupied by him in a place named will include all the goods contained therein at the time the mortgage was executed: *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289; *Wolfe v. Dorr*, 24 Me. 104; *Crow v. Red River etc. Bank*, 52 Tex. 362; *Shaw v. Glen*, 37 N. J. Eq. 82; *State v. Cooper*, 79 Mo. 464; *Ebberle v. Mayer*, 51 Ind. 236. Such a mortgage includes barrels of salt stored in a shed used in connection with the store, and kept for sale as part of the stock in trade, and also barrels of oil removed from the store and upon the pavement in front of it: *Stephens v. Pence*, 56 Iowa, 257. So such a mortgage has been held to include a horse, wagon, sleigh, and harness used in connection with the business: *Arnett v. Trimmer*, 43 N. J. Eq. 488. A mortgage of a stock of goods, together with the fixtures, furniture, and signs of a store, was held to include a wooden statue of an elephant, used in front of the store during the day, and taken inside at night: *Curtis v. Martz*, 14 Mich. 506. Where a mortgage is given upon the goods and chattels in a certain building, "an inventory whereof is to be made and annexed," it is valid as to the property in the building at the time of the execution of the mortgage, although no schedule was annexed afterwards: *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480.

A description which, after mentioning specified articles, goes on to describe other articles will generally have the effect of extending the mortgage over the articles named in the general clause, if the language indicates such purpose. Thus a mortgage conveying a list of articles used in and about a hotel, "together with all other goods, effects, furniture, chattels, property, things of every name and nature now used, attached, situate, and being in or about the hotel," will embrace a schooner-rigged sail-boat, which is upon the water near the hotel, and used in connection with it, although four other such boats are specially mentioned: *Veazie v. Simberly*, 5 Allen, 280. So a mortgage of "one bay horse, one cow, one chaise and harness, one sleigh, robes and harness, one saddle and bridle, all the farming tools, and other personal property in and about the barn and premises at Herbert Hall; all the furniture, and all other articles of personal property in and about" such hall, — will convey a family carriage on the premises at the time, and belonging to the mortgagor: *Goulding v. Sweet*, 13 Gray, 517. So a mortgage of all the furniture in and belonging to a certain house may include pictures, pianos, and billiard-tables: *Sumner v. Blakelee*, 59 N. H. 242; 47 Am. Rep. 196. Although the substitution or exchange of other property for that described in the mortgage will divest the mortgage lien as against a third person without notice of an agreement between the mortgagor and mortgagee to that effect (*Sharpe v. Pearce*, 74 N. C. 600; *Powers v. Freeman*, 2 Lana. 127), still a change made in the mortgaged property by way of repairing it or completing it will not so divest the lien: See note to *Gregg v. Sanford*, 76 Am. Dec. 726. Thus where a mortgaged rifle is described as having a metallic stock and an under-action lock, the lien will not be divested by having it restocked with a wooden stock and an over-action lock: *Comins v. Newton*, 10 Allen, 518. So though pickles are described as being in bulk, they are still covered by the mortgage after they have been bottled: *Crosby v. Baker*, 6 Id. 295. So if a planing-mill is described by name, and as being in a certain place, the mortgage lien will attach to it when completed, though at the time of the execution of the mortgage it was in an unfinished state, and several other material parts were afterwards added to make it complete: *Lawrence v. Everts*, 7 Ohio St. 194.

In relation to chattel mortgages of growing crops, the rules heretofore given apply with all their vigor, and, subject to them, it has been held that a mortgage of "thirty-five acres of winter-wheat now standing and growing on the southeast quarter of section No. 29, township No. 24, of range 1 east, in Harvey County, state of Kansas," is a sufficient description to put third parties on inquiry, and is notice to them: *Muse v. Lehman*, 30 Kan. 514. A mortgage of "one third of twenty-two acres of growing wheat situate" in a certain place means an undivided one third of such wheat, and is a sufficiently particular description: *Zehner v. Aultman*, 74 Ind. 24; and the same doctrine is maintained in *Sims v. Mead*, 29 Kan. 88, where the mortgaged property was described as being "the undivided two thirds of forty acres of growing wheat, being all the wheat in and growing on what is known as the old John Wise farm, on Gilmore Creek, in Morris County, Kansas"; and to the same effect is *Potts v. Newell*, 22 Minn. 561. And a mortgage of "fifty thousand pounds of cotton, to be produced during the present year," upon a certain plantation, "the said cotton to be the first cotton which may be gathered from the crop of cotton now planted and growing upon the said plantation, and to be neatly ginned and packed in good bales ready for market," sufficiently describes the property as against third parties: *Robinson v. Mauldin*, 11 Ala. 977. To the same effect, *Stearns v. Gafford*, 56 Id.

544. But a mortgage of a certain number of bales of cotton out of a larger amount is not good as against creditors of the mortgagor, or others acquiring adverse rights, unless it furnishes some data for separating the mortgaged portion from the remainder. Thus a mortgage of ten bales of each annual crop of cotton to be raised for six years, without any other description, is insufficient: *Dodds v. Neel*, 41 Ark. 70. So a mortgage for a certain number of bales of cotton out of a crop is an insufficient description, standing alone, as it furnishes no means of identification or separation of the specific property mortgaged: *Person v. Wright*, 35 Id. 169. So a mortgage of a bale of cotton which the mortgagor "may make during this year" is insufficient, because it fails to designate the place where it is to be produced, and because it does not identify the property so that it can be separated from other property of similar kind raised by the mortgagor: *Atkinson v. Graves*, 91 N. C. 99. A mortgage, however, of "my entire crop of cotton and corn of the present year," without other descriptive words, is sufficiently certain: *Ellis v. Martin*, 60 Ala. 394; *Smith v. Fields*, 79 Id. 335; *Varnum v. State*, 78 Id. 28; *Hamilton v. Maas*, 78 Id. 283; *Crine v. Tifts*, 65 Ga. 644. But a mortgage on crops to be sown or planted, to be valid as against third parties, must state the year or term in which the crops are to be grown: *Pennington v. Jones*, 57 Iowa, 37; *Eggert v. White*, 59 Id. 464; *Barr v. Cannon*, 69 Id. 20; *Cole v. Kerr*, 19 Neb. 553. And where the property is described as "all the crops raised by me in any part of Jones County for the term of three years," the mortgage is too indefinite and uncertain to charge third parties with notice: *Muir v. Blake*, 57 Iowa, 662. But a mortgage describing "crops growing and to be grown" is valid only as to the crops growing, and as to them it sufficiently states the year in which they are to be grown: *Luce v. Morehead*, 73 Id. 498. A mortgage on a ten-acre field of growing wheat described as being in a certain locality, county, and state is sufficient, and the record thereof is notice to *bona fide* purchasers from the mortgagor: *Duke v. Strickland*, 43 Ind. 494. A mortgage of a crop of grain as "now growing and standing" will not include, as against third parties, grain which had been cut or thrashed at or near the time of the execution of the mortgage. Grain "growing and standing" means that which is nourished and supported by the earth: *Ford v. Sutherland*, 2 Mont. 440.

HAWK & CO. v. EVANS.

[76 IOWA, 592.]

RES JUDICATA. — JUDGMENT IN SUMMARY PROCEEDINGS against attorneys for moneys received by them, denying the motion, is an adjudication that such attorneys were not liable, and precludes any further action against either of them to enforce any liability claimed to have existed when the motion was made. The fact that the plaintiff in the prior proceeding only asked for a final order requiring the defendants to pay over the money collected by them, and that such an order, if obtained, could not have been enforced by execution, does not impair the effect of the denial of the motion. A prior adjudication is not nullified by the failure of the moving party to ask for all the relief to which his pleadings entitle him.

LAW. — A motion for an order against an attorney to compel him to pay over money collected by him, containing only the essential facts to entitle the plaintiff to the relief asked, is a privileged communication, and not libelous.

S. I. King, for the appellant.

John A. Berry, for the appellees.

ROTHBROOK, J. The evidence tended to show that the plaintiff placed in the hands of the defendants, as attorneys at law, for collection, a claim or demand against R. B. Ely. At that time the defendants were partners, and as such received the claim for collection. Afterwards, such partnership was dissolved, and thereafter Ely paid the amount due on the claim to the defendant Evans. Prior to the commencement of this action, the plaintiff commenced a proceeding against the defendants under the provisions of section 2906 of the code, which provides as follows: "Judgments or final orders may be obtained, on motion, by . . . clients against attorneys, plaintiffs in execution against sheriffs, . . . for the receiving of money or property collected by them." It is also provided, in section 2910 of the code, that such "motion shall be heard and determined without written pleadings, and judgment given according to law and the rules in equity." In the proceeding so commenced by the plaintiff, the relief asked was for "a summary order against said defendants, and each of them, as aforesaid, requiring them to pay over to these plaintiffs the said sum," etc. There was a trial, and the "court, being fully advised, denied the motion." This is the judgment which was pleaded as a prior adjudication, and the court held it did not amount to an adjudication which barred this action.

1. It will be observed that the plaintiff in the special proceeding only asked for a final order requiring the defendants to pay over the money collected by them, or either of them; and as such an order cannot be enforced by execution, counsel for the plaintiff insists there has been no adjudication. But is this a sufficient answer? Under the statute, the plaintiff could have asked for a judgment, and we are aware of no rule of law under which a prior adjudication has been defeated simply because a party has not asked for all the relief to which, under the facts pleaded, or in this case stated in the motion, he was entitled. It is obvious that the plaintiff could have asked for a judgment or final order, or possibly for both.

Now, the fact that he only asked for the latter cannot possibly, we think, destroy the effect of the adjudication, or aid in the determination whether there has been one or not. It is undoubtedly true, that if the plaintiff was not entitled to a final order, he was not entitled to judgment. The same evidence would be required in either case. The precise matter in issue in this case was in issue in the special proceeding, and it was therein adjudged that the plaintiff was not entitled to the relief asked. The difference in the manner of enforcing a final order and a judgment is immaterial. It is said in argument that the court denied the relief asked in the motion, on the ground that the money had been paid to Evans after the dissolution of the partnership of Evans and Roadifer. Whether this is so we are not advised. The record fails to disclose the ground upon which the court proceeded, and therefore we are not called on to determine whether, if the court did so, it would destroy the effect of the adjudication. It is provided by section 2910 of the code that judgment shall be rendered in said special proceeding according to law and the rules of equity. A trial was had, and the judgment dismissing the special proceeding recites that the court "heard the testimony adduced in support of and against the motion," and denied the motion as to H. H. Roadifer. This was a complete adjudication that H. H. Roadifer was not liable to the plaintiffs. If the plaintiffs were not satisfied with the judgment of dismissal, they should have appealed therefrom. An appeal is expressly authorized by subdivision 2, section 3164, of the code. If there had been an order or judgment against the defendant Roadifer in that proceeding, he would have had no remedy except an appeal. The rights of the parties must be reciprocal. It would be an utterly indefensible position to hold that one of the parties was bound by the order in that case, and the other was not. A court has jurisdiction when it decides incorrectly, as well as when the decision is right. In *Hahn v. Miller*, 68 Iowa, 745, it is held that the most infallible test as to whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence would have maintained both actions. Applying the rule in this case, it is very plain that the same evidence would sustain the motion which is necessary to sustain the petition. In *Dwight v. St. John*, 25 N. Y. 203, in determining the effect of a decision upon a summary motion to have certain judgments canceled and discharged of record, it is said: "Since, then, a full hear-

ing, with the right of appeal, was open to defendant on that motion, how is he to avoid the binding effect of that decision so far as it covers what was actually and necessarily tried?" In that case the fact that there was the right of appeal was a controlling consideration, leading to the determination that the decision of the motion was a bar to a subsequent action. As sustaining to some extent our holding that the decision of the motion was an adjudication, see also *In re Livingston*, 34 N. Y. 555, and *Easton v. Pickersgill*, 75 Id. 599. We think the court erred in holding that the special proceeding was not a prior adjudication.

2. The libel is based on the matter stated in the motion. As it was authorized by statute, and only contained the essential facts entitling the plaintiff to the relief asked, and as there is nothing tending to show bad faith, we think the motion was a privileged communication, and therefore the court rightly held it was not libelous. For the error above indicated the judgment is reversed.

CHIEF JUSTICE REED dissented from the foregoing opinion, and expressed the view that Roadifer having undertaken as one of the partners to make the collection, he was bound to see that the money, when collected, notwithstanding the dissolution of the partnership, was paid over to his client; that the judgment in the summary proceeding simply determined that he had not collected or received the money, and could not therefore be held liable in that action; that this was the only matter which could have been adjudicated in that proceeding, and that it was the only matter which acted as an estoppel as against the plaintiff, and that if he had a cause of action against the attorney, growing out of the collection of the money, he still had the right to pursue the remedy offered him in an ordinary action at law to collect it.

SLANDER AND LIBEL. — Words spoken and happenings incident to judicial proceedings cannot, as a general rule, be made the ground upon which to predicate actions for slander or libel: *Shadden v. McKlwee*, 86 Tenn. 146; 6 Am. St. Rep. 821, and note; *Hunckel v. Vonieff*, 69 Md. 179; 9 Am. St. Rep. 413, and note; *Maulsby v. Reifsnider*, 69 Md. 143.

RES ADJUDICATA. — Before a judgment in one action can operate as a bar to another, it must appear that the precise question involved in the second action was raised and determined in the first: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note; but a judgment is a bar to a judgment in a subsequent action, involving not only questions actually litigated, but which might have been litigated: *Id.*; *Hanson v. Manley*, 72 Iowa, 48. A former judgment, to be a bar, must have been rendered upon the merits: *Pepper v. Donnelly*, 87 Ky. 259; *Edgar v. Buck*, 65 Mich. 356. The defense of former adjudication must be specifically averred, to be made available: *Harrison v. Hoff*, 102 N. C. 126; *Blackwell v. Dibbrell*, 103 Id. 270; *Thompson v. Griffin*, 69 Tex. 139.

RES ADJUDICATA — INSTANCES OF. — Where one brings action claiming money deposited in a bank, and drawn therefrom by defendant, and the

defendant sets up in his answer a claim of title in himself, and judgment is had upon such answer, such adjudication is a bar to a subsequent action by plaintiff for the money, although he had made demand upon the bank prior to the adjudication: *Glass v. Citizens' Nat. Bank*, 116 Ind. 492. Where plaintiff sued to annul a contract for conveyance of swamp-lands, etc., and the court dismissed the petition without prejudice to plaintiff's right to sue for a breach of the contract, such dismissal was an adjudication that the contract was valid, and a bar to a subsequent action by plaintiff to divest a grantee of equitable title to land included in such contract: *Adams County v. Graves*, 75 Iowa, 642. Where plaintiff in a former action claimed title to disputed realty, the only issue being whether the devise under which he claimed was applicable to and embraced the realty, a judgment in such action was *res judicata* as to defendant in a subsequent action between the same parties involving the same title: *Bickett v. Nash*, 101 N. C. 579. A recovery of the consideration money and interest, in a suit on a covenant that the grantor is the lawful owner of the realty in question, is a bar to another suit based upon the covenant of warranty in the same deed: *Leggett v. Lippincott*, 50 N. J. L. 462. A judgment that plaintiff was owner of certain realty, and that defendant was not and never had been owner thereof, is a bar to a subsequent action by defendant to recover damages for injuries done by plaintiff to the same realty: *McElhove v. Blackwell*, 101 N. C. 192. The report of a master, confirmed by the circuit judge, and not excepted to and appealed from, is *res adjudicata* as to the matters passed upon in such report: *Hubbard v. Camperdown Mills*, 26 S. C. 581. A judgment for damages in favor of a land-owner against a railway company that erected a bridge over his land is *res judicata* as to all actions for damages for the same cause, provided the bridge was properly constructed: *Chicago etc. R. R. Co. v. Schaffer*, 124 Ill. 112; so a judgment for damages caused by a nuisance, which is alleged to have entirely destroyed an easement, and occasioned thereby permanent damage to plaintiff, is a bar to future actions for damages resulting from the same nuisance: *Harmon v. Railroad*, 87 Tenn. 614; and to the same effect is *Kewell v. New York etc. R. R. Co.*, 147 Mass. 606. A judgment rendered against a married woman joined with her husband in an action in which she claimed damages of defendant for imitating her medicinal preparations is a bar to a subsequent action by the woman alone, in which she alleges that she is the inventor of the medicines in question, but which action in the main involves the identical questions adjudicated in the prior action: *Marshall v. Pinckham*, 73 Wis. 401. But it is not settled that the record of the probate of a will has the effect of *res judicata*: *Lange v. Dammer*, 119 Ind. 568. Instructions decided erroneous upon appeal cannot be given at a new trial of the same case in the lower court, where the evidence is the same as in the former trial: *Smith v. Snyder*, 82 Va. 614. A decision of the circuit court of the United States upon the Maryland statutes is *res judicata* in all cases between the same parties involving the same question: *Western Tel. Co. v. Baltimore etc. R. R. Co.*, 69 Md. 211; so a judgment in a federal court is *res judicata* upon the same question between the same parties in the state court: *Gage v. De Puy*, 127 Ill. 217. For other instances, see *Johnston v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129; *Knorr v. Peerless Reaper Co.*, 23 Neb. 636; 8 Am. St. Rep. 140, and note; *Byrne v. Minneapolis etc. Ry Co.*, 38 Minn. 212; 8 Am. St. Rep. 668; *Weyand v. Atchison etc. Ry Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504, and note; *McLaughlin v. Doane*, 40 Kan. 392; 10 Am. St. Rep. 210, and note; *Smith v. Los Angeles etc. Ass'n*, 78 Cal. 289; 12 Am. St. Rep. 53; *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep.

190; *Pierre v. St. Paul etc. Ry Co.*, 39 Minn. 451; 12 Am. St. Rep. 673; *Mackey v. Fisher*, 36 Minn. 347; *San Francisco v. Holladay*, 76 Cal. 18; *Blodgett v. Doss*, 81 Me. 197.

RES JUDICATA — INSTANCES OF WHAT IS NOT. — Where a chattel mortgage was given to secure two notes, and the mortgagee sued for recovery of the mortgaged property, and defendant, alleging merely a failure of consideration for the notes and mortgage, obtained a judgment in his favor, such judgment is not a bar to a counterclaim based upon a failure of consideration, in an action upon the notes, brought by the same plaintiff against the same defendant: *Osborne v. Williams*, 39 Minn. 353. A judgment for a balance due a mortgagee, in an action to redeem mortgaged chattels, is *res judicata* as to the balance due, but not a bar to a separate action of claim and delivery by the mortgagee to recover the mortgaged chattels: *Gulley v. Copeland*, 102 N. C. 326. An acquittal of a railroad company upon a criminal charge of maintaining a nuisance does not operate as *res judicata* in an action by the county to recover the costs of removing the obstruction from the highway which was alleged to be the nuisance: *Dyer County v. Railroad*, 87 Tenn. 712. Whenever the record shows that a former judgment was not rendered in whole or in part upon the cause of action asserted in the second suit, such judgment cannot operate as *res judicata* in the second action: *Pistolaway v. Runnels*, 71 Tex. 352. An order of general term reversing a judgment entered upon a verdict directed by the trial court, and ordering a new trial, is not *res judicata* between the parties: *Siedenbach v. Riley*, 111 N. Y. 560. A judgment of dismissal will not bar another action founded upon the same cause of action, if the dismissal was for the reason that the court had not jurisdiction to hear it upon the merits: *Yankey v. Sweeney*, 85 Ky. 55. An adjudication does not bind one who is not a party to an action, although an attorney without authority appears for him: *Hume v. Fransen*, 73 Iowa, 25. That one's parents ineffectually attempted to relieve property from taxation in former proceedings does not bar such a one from claiming such property as exempt from taxation upon entirely different grounds: *Red v. Morris*, 72 Tex. 554. The question of identity of issues when a judgment is pleaded as *res judicata* is a question which may require a finding of fact by a jury: *Monks v. McGrady*, 71 Id. 134.

WERT v. POTTS.

[76 IOWA, 612.]

ARREST — LIABILITY FOR UNLAWFUL ACT OF ONE OF SEVERAL ENGAGED IN A LAWFUL PURPOSE. — Where two or more are acting lawfully together in the furtherance of a common lawful purpose, as making an arrest of one charged with crime, neither is liable for the unlawful act of another, done in furtherance of the common purpose, without his concurrence.

Spurrier and Blackman, for the appellants.

BECK, J. 1. The defendants, in addition to a general denial of the petition, pleaded the following, among other special defenses: "4. In relation to the matters and times referred to in plaintiff's petition, the defendants say, and aver the truth

to be, that they were legally attempting to arrest one John Harty for criminal offense, upon a warrant for the arrest of said Harty, issued by one Miller, and delivered to defendant G. W. Potts, an acting constable of Saylor township, Polk County, Iowa, said Miller being then an acting justice of the peace of said township, and defendant Hamilton being then and there assisting said Potts in making such arrest under the command and directions of said Potts as constable; that the said Harty resisted such arrest, and assaulted defendants with a base-ball bat, while one Thomas McCall assisted in said resistance by shooting at said defendant Hamilton with a revolver; that defendants, Potts and Hamilton, used only such force as was necessary to protect themselves from great bodily injury at the hands of Harty and his confederate; that they did not fire revolvers recklessly or carelessly; and that any injury received by plaintiff at the hands of the defendants, if he received any, was through his own fault and carelessness." There was evidence tending to support the allegations of the petition and of the answer.

The district court gave the following among other instructions to the jury: "It is not claimed in this action that the plaintiff, Edward Wert, was in any way connected or concerned in the attempted arrest of John Harty by the defendants, and the wound inflicted upon him by defendants, if it was so inflicted, was the result of accident. So the liability of defendants depends solely upon whether the defendants acted rightfully in attempting to make the arrest of said Harty, and whether or not the force used by them in making said arrest was an unlawful force, and whether said wound was inflicted by either of the defendants. When two or more act together in the furtherance of a common purpose, each is liable for the acts of the other done in the furtherance of a common purpose. It appears that defendants were acting in the common purpose of arresting John Harty, and are equally liable, or not liable, in this action."

2. These instructions are clearly erroneous. Where two or more are acting lawfully together in the furtherance of a common lawful purpose, one is not liable for the unlawful act of another, done in furtherance of the common purpose, without his concurrence. The rule would probably be different if the common purpose be unlawful. The facts presented by the pleadings and evidence illustrate the rule, and support its application to this case. The purpose of defendants in the

arrest of the offender was lawful. Now, if one or the other of the defendants, without cause or justification, did discharge a pistol at the accused, without the concurrence of the other, with the purpose of aiding in the arrest, the other defendant would not be liable for such unlawful act. Surely, no one is ready to claim that officers and others, acting in concert in making a lawful arrest, are liable for the unlawful act of one of their number, done without their concurrence. Did the rule of the instruction prevail, all engaged in preserving the peace, and enforcing the law by arrest, would be subject to liability for the unlawful act of one over whom they had no control, and in whose unlawful purposes they in no manner shared. The thought of the instruction, that the common purpose of arrest made each defendant liable for the unlawful acts of the other, is apparently wrong, and doubtless was extremely prejudicial to defendants.

As there is no appearance for plaintiff, we consider no other questions raised by defendants. We refrain, as far as it is possible, from deciding questions not argued, especially in cases where there is not an appearance for both sides.

The judgment of the district court is reversed.

TORTS. — If one or more of several persons, engaged in the accomplishment of a lawful purpose, even with a view to aid such purpose, become tortfeasors, the others, who neither direct nor countenance such tortious acts, are not liable: *Richardson v. Emerson*, 3 Wis. 319; 62 Am. Dec. 694.

LINDLEY v. FIRST NATIONAL BANK OF WATERLOO.

[76 IOWA, 629.]

BANKS AND BANKING — ACCEPTANCE OF DRAFT BY TELEGRAM. — One who promises in advance to accept or pay a bill of exchange is bound by such promise only when the bill conforms to the terms of the offer; hence when the drawee telegraphed to the drawer that he would pay a draft in the payee's favor for two thousand dollars, he is not bound to pay such draft drawn for two thousand dollars with exchange on New York, because this is equivalent to a draft for two thousand and two dollars.

CUSTOM, TO BE PROVED, MUST BE PLEADED; so held where it was attempted to prove a custom of bankers, in paying drafts on them, to pay exchange in addition to the face of the draft.

F. C. Platt, for the appellant.

Boies, Husted, and Boies, for the appellee.

REED, C. J. On the 17th of November, 1887, George Barro sent a dispatch from Los Angeles, California, to defendant, directing it to transmit two thousand dollars by telegraph to plaintiff at Los Angeles, and charge the amount to his account, he having at the time a deposit of a larger amount with defendant. On the next day, defendant's cashier telegraphed to plaintiff that the bank would pay Barro's draft on it for two thousand dollars. On the receipt of that dispatch at Los Angeles, Barro drew his draft, and delivered it to plaintiff in payment of an indebtedness he was owing him. The following is a copy of the draft:—

“\$2,000. **LOS ANGELES, CAL., November 18, 1887.**

“At sight, pay to order of Hervey Lindley, of Los Angeles, California, two thousand dollars, with exchange on New York, for value received, and charge to account of

“**GEORGE BARRO.**

“**TO FIRST NATIONAL BANK, Waterloo, Iowa.**”

The draft was subsequently presented, but defendant refused to accept or pay it. On the same day on which he sent the dispatch, the cashier also wrote to plaintiff that the bank would pay Barro's draft for two thousand dollars, but the letter was not received by plaintiff until after he had taken the draft. On the 28th of November, which was after the draft had been presented and refused, he also wrote to plaintiff that the bank had been enjoined from paying, and that but for such injunction it would have paid it when presented. The foregoing facts are alleged in the petition, and further, it is alleged that the exchange provided for in the draft would have amounted to two dollars. The petition is in three counts. The first and second counts are drawn on the theory that the telegram and letter of the 18th of November amounted to an acceptance. The third count states a cause of action on the breach of the contract to accept.

The ground of the demurrer is, that the draft drawn is materially different from that which defendant agreed to pay, requiring the payment of a greater sum of money. Counsel for appellee concede that, if the draft had called for the payment of but two thousand dollars, the telegram, which was received by plaintiff before he took the draft, would have amounted to an acceptance; but their position is, that, as the draft drawn required the payment of a greater sum, the promise of the bank to pay cannot be regarded as an acceptance of

it, and its refusal to pay the amount demanded was not a breach of its contract.

The contention of counsel for appellant was, that the promise to pay was in effect a general acceptance, and defendant was therefore bound to pay according to the tenor of the draft, and that the request to pay exchange related merely to its tenor. That the acceptor is, by a general acceptance, bound to pay the bill according to its terms is certainly true: Edwards on Bills, c. 9, sec. 1. But the term "tenor of the bill," as used in the books and cases, relates merely to the time and manner of payment. Under a general acceptance, the acceptor is bound to pay, at the maturity of the bill, as fixed by its terms, and in the manner designated. He is also bound to pay the amount named in the bill, and if it demands the payment of exchange, he is liable for the amount thereof. In such case, the acceptance being general, the terms of the contract are to be gathered from the language of the bill. But when he offers, in advance of the drawing of a bill, to accept or pay it, his undertaking is to be determined from the language of his offer. If a bill is drawn corresponding in terms with his offer, and is received by another in reliance on the offer, he will be liable from the time as an acceptor. But the bill drawn must correspond in terms with his offer, or no such result will follow. His liability, if any, is created by his contract, and it is impossible that he should be bound by conditions or stipulations to which he never gave his consent. Judged by this rule, it is manifest that defendant is not liable. Its offer was to pay a specified sum on the draft of Barro. The offer implied, of course, that the payment was to be made at Waterloo, that being its place of business. But the draft required either that the money should be paid in New York, or that an additional amount should be paid to cover the exchange. In effect, it was a draft for \$2,002, while defendant's promise was to pay one for \$2,000. If the draft had been for two thousand five hundred dollars, or any larger sum, it would hardly be contended that defendant was bound to pay it; yet the principle would not be different. Our attention has not been called to any case involving the same state of facts. But the principle that one who promises in advance to accept or pay a bill of exchange is bound upon such promise only when the bill, in its terms, conforms to the terms of his offer, is well settled, and is founded in sound reason: *Brinkman v. Hunter*, 73 Mo. 172; 39 Am. Rep. 492; *Ulster County Bank v. McFar-*

lan, 5 Hill, 482; *Gates v. Parker*, 43 Me. 544; *Murdock v. Mills*, 11 Met. 5. The letter of the 28th of November was not an acceptance or promise to pay the draft, but was explanatory merely of the refusal.

It was urged in argument that it is a custom of bankers, in paying drafts drawn under like circumstances, to pay exchange in addition to the face of the paper, and hence that defendant's promise was impliedly a promise to pay with exchange. It is sufficient to say, with reference to that claim, that the custom is not pleaded. The action is upon the promise as written, and its language is unambiguous. The words made use of import a promise to pay two thousand dollars. Without some averment that the words made use of have a meaning different from their ordinary signification, it cannot be assumed that the undertaking was broader than it expressed. We have no occasion to inquire whether the custom, if pleaded, could be shown for the purpose of modifying or explaining the undertaking. As we reach the conclusion that upon the facts alleged defendant is not liable, it is not necessary to consider the question as to the ruling of the district court in striking out portions of the petition. The error, if one was committed, in no manner affects the result.

Affirmed.

TELEGRAM — DRAFT. — Where one, by telegram, authorizes a draft to be drawn upon him, and it is so drawn and discounted upon the faith of such telegram, but he subsequently countermands the authority by telegram, he cannot be held as an acceptor: *First Nat. Bank v. Clark*, 61 Md. 400; 48 Am. Rep. 114. So when one promises, by telegram, to accept a draft for a certain amount, he cannot be held liable for not accepting a draft for a larger amount: *Brinkman v. Hunter*, 72 Mo. 172; 39 Am. Rep. 492. A telegram authorizing one to draw a draft is not itself an acceptance, but implies a promise to accept: *Franklin Bank v. Lynch*, 52 Md. 270; 36 Am. Rep. 375.

USAGES AND CUSTOM — PLEADING. — General usage in a particular business need never be pleaded: *State v. Morton*, 27 Vt. 310; 65 Am. Dec. 201; but the existence of a custom among county courts to delegate the performance of certain duties, etc., is such a custom as must be pleaded to be proved: *Gano v. Palo Pinto County*, 71 Tex. 99.

AM. ST. REP., VOL. XIV. — 17

MILLER v. MINNESOTA AND NORTHWESTERN RAILWAY COMPANY.

[76 IOWA, 653.]

RAILROADS—LIABILITY FOR NEGLIGENCE IN OPERATING A CONSTRUCTION TRAIN. — A railroad company which agrees to furnish all motive power and cars, and operate the construction trains for a contractor who agrees to lay a certain number of miles of track per month, is not liable in damages for injury to one of the contractor's employees, caused by the rapidity with which a construction train was run, when, under the contract, the company had no control over the construction train, though the train crew were on the pay-roll of the company, and received their pay from it.

Fouke and Lyon, and Lusk and Bunn, for the appellant.

Henderson, Hurd, Daniels, and Kiesel, for the appellee.

ROTHROCK, J. The train by which the deceased was killed was a track-layers' construction train. The road was unfinished at the place of the accident. The rails were not spiked to all of the ties; and as the train, which consisted of cars heavily loaded with steel rails and other construction materials, was being backed to the end of the track, the rails in the track spread, the train was derailed, and Miller, who was riding on one of the cars loaded with rails, was killed. A material question in the case is, Was the defendant in any event liable in damages for the alleged negligence claimed to be the cause of the casualty? The question arises upon a contract between the defendant company and a partnership known as Harris & Co., which contract is as follows: —

“ST. PAUL, MINN., July 9, 1886.

“A. B. STICKNEY, Esq., President Minnesota and Northwestern Railway Company, St. Paul, Minnesota.

“*Dear Sir,* — The undersigned hereby propose to lay as much track as you may require on the Dubuque and Northwestern railway, from the end of the present track near Durango, westward, commencing about the 20th of August next, and laying at the rate of not less than thirty-five (35) miles per month. Also to lay what track you may require on the line of the Minnesota and Northwestern railroad, between Chicago and the junction with the Illinois Central railroad near Freeport, commencing immediately after completing the work on the Dubuque and Northwestern railway, above specified, at the rate of not less than thirty-five (35) miles per month, to lay such track in good workmanlike manner at sub-

grade, and to handle all material, including loading and unloading rails and ties that are delivered during the time we are laying track, at and for the sum of two hundred and twenty-five (\$225) dollars per mile, with an extra allowance of twenty (\$20) dollars for each split switch and frog, and fifteen (\$15) dollars for each stub switch and frog. You to furnish all motive power and cars and operate the construction trains; we to furnish all tools and machinery and labor necessary to lay said track. This price to cover all royalty for the use of machines. Payments to be made on the fifteenth day of each calendar month for all work done during the previous month, reserving ten per cent (10 per cent) until all of said work is completed.

"HARRIS & Co.,

"By GEO. F. HARRIS.

"This proposition is accepted. M. & N. W. R. R. Co.,

"By A. B. STICKNEY, President."

Under this contract, the appellant furnished a construction train with a crew to operate it, and Harris & Co. proceeded with the work of track-laying. The plaintiff's intestate was an employee of Harris & Co., engaged in laying down the rails on the track. At the time of the accident by which Miller was killed, he was riding to the front, to his work, and was seated on a platform-car loaded with rails. Harris & Co. were made defendants in the action, but they obtained an order for a separate trial in the district court. It is not claimed by counsel for the plaintiff that the appellant is liable by reason of any negligence in attempting to run the train over an insufficient and unsafe track. It is conceded that the manner in which the track was laid was a matter not under the control of the appellant, and that it is not liable for any negligent acts of Harris & Co. But it is claimed, under the above contract and the evidence in the case, that the defendant is liable for the negligent conduct of its engineer in running the train over an unfinished track at a dangerous rate of speed, without keeping a lookout ahead. This question is to be determined mainly by a construction of the said written contract. It will be observed that the construction train was under the absolute control of Harris & Co. There is no dispute as to the correctness of this proposition, so far as the general direction of the work to be done by the train was concerned. This is necessarily implied from the fact that the contract requires Harris & Co. to handle all material, and to load and unload the same as required for the work. They were bound by the

contract to lay the track at the rate of thirty-five miles per month; and to do their work, they must of necessity have had the control of the train. They could direct it to be placed at any desired point on the road to load or unload, direct it when to start on a trip, and when and where to stop, and the number of trips. All of this seems to be conceded by counsel for appellee; but they claim that the train-men were not under the control of Harris & Co. as to the speed with which the train was to be run over the road, and as to the care with which the same was to be managed while in motion. There is no evidence that the defendant, by any direct act, retained any control over the train and its crew. On the contrary, as it was at work in constructing a road, it was not running under any time-card, nor by the direction of any train-dispatcher of the defendant. The fact that the engineer, fireman, brakemen, and conductor, who composed the train crew, were retained upon the defendant's pay-rolls, and received their wages from the defendant, does not tend to show that the defendant retained any control of the movements of the train. The furnishing of the train and the payment of the train-men was part of the consideration paid by the defendant to Harris & Co. for laying the track.

Counsel for appellee claim that, under the clause of the contract requiring the defendant to "operate the construction train," the control of the train crew as to the rate of speed at which the train should be run, and the care and vigilance to be exercised by the engineer, was not given to the contractors. This we think was giving the word "operate," as used in the contract, a much more extended significance than is authorized by the contract. It is not used in the general sense common to all the acts necessary to the use of a railroad by moving trains over it. The whole scope of the contract shows that it is used in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractors, Harris & Co.; and to limit the control of Harris & Co., so as to allow the train-men or the defendant to determine how fast or how slow the train must be run, finds no warrant in the contract. Suppose that the train-men should have persisted in running the train so slow as to seriously impede the progress of the work, or that they should have run so fast as to endanger the safe carriage of the materials, there can be no doubt that Harris & Co. had the power to require them to move the train at a proper rate of speed.

As we construe this contract, the defendant is not liable for the damages occasioned by the death of plaintiff's intestate, and the court should have so instructed the jury. The rule is well established — indeed, it is fundamental — that where an independent contractor is employed to construct a building, or to perform any other work, and the employer reserves no control as to the manner of performance, the employer is not liable for the contractor's negligence: *Kellogg v. Payne*, 21 Iowa, 575; *Callahan v. Burlington etc. R'y Co.*, 23 Id. 562; *Wood v. Ind. District of Mitchell*, 44 Id. 27. And to the same effect, and as somewhat bearing upon the facts in this case, see *Wood v. Cobb*, 13 Allen, 58; *Kimball v. Cushman*, 103 Mass. 194; 4 Am. Rep. 528; and *Hitte v. Repub. Val. R'y Co.*, 19 Neb. 620.

The Dubuque and Northwestern Railway Company and the Minnesota Loan and Debenture Company were made parties defendant. The court, on their motion, directed a verdict for them. The plaintiff appeals from this order of the court. The cause must be affirmed upon this appeal. It does not appear that either of said defendants had any control over the train, nor the laying of the track. The judgment of the district court upon plaintiff's appeal will be affirmed, and upon defendant's appeal it will be reversed.

RAILROAD COMPANIES. — The employer is not generally liable for the acts, negligence, or torts of a contractor: Extended note to *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 200-206. A contractor building a line of railway, and undertaking to restore all public crossings, is primarily liable to any one injured by his negligence, and must even recompense the railway company for any damages it may have been compelled to pay by reason of a failure to restore the highways to their proper condition at the railway crossings: *Dallas et. R. R. Co. v. Able*, 72 Tex. 150.

HAWN v. BANGHART.

[76 IOWA, 688.]

SEDUCTION — ARTIFICE, WHAT IS AN. — Where a married man forty-two years old had sexual intercourse with his domestic, a girl fifteen years of age, after continuous daily love-making for some months, it was held, in an action for seduction, that if the means made use of by the man were calculated to overcome the will of a girl of her years and experience, and were intended to create in her mind an affection for him, and did have that effect, and if under that influence she yielded her person to him, this amounted to an "artifice," within the meaning of the law, and the sufficiency of the evidence to establish that fact and constitute it seduction was for the jury.

SEDUCTION. — DAMAGES FROM LOSS OF SOCIAL STANDING, in general, may be considered by the jury in estimating damages, but the fact that individual acquaintances or associates of plaintiff have refused to recognize her since her seduction cannot be taken into consideration in estimating damages, or for any other purpose.

Alanson Clark, for the appellant.

Winslow and Varnum, for the appellee.

REED, J. 1. At the time of her alleged seduction, plaintiff was but fifteen years old. Defendant is a married man about forty-two years old, and she was employed as a domestic in his family. As plaintiff's testimony is the only evidence given on the trial in support of the allegations of the petition, and the principal question in the case is, whether upon it she was entitled to have the case submitted to the jury, we set it out as it is contained in the abstract. It is as follows: "I went to his house to work on the 8th of March, 1886, and remained there, with the exception of about one month, until the 1st of November following. When I was at Mr. Banghart's, in his family, defendant got so, if I came around him, he was always pulling me down on his lap, and hugging and kissing me, and finally I got so I really cared for him. It got to happen quite frequently, and commenced about three months after I first went there. My duties, while there, required me to make the fires in the kitchen stove, first thing in the morning. While at his home, I slept on a lounge in the kitchen. About a month after this kissing and hugging began, something further was attempted. It was a daily occurrence. I finally became so that I cared for him. I went out to make the fire one morning, and the defendant always helped. All the balance of the family were in bed. It was about sun-up. The fire was made in the summer kitchen, about ten feet from the house. When I stooped down to light the match, he sat down behind me, and when I started to get up he pulled me down on his lap and tormented me a while, and then threw me down on the floor, and had sexual intercourse with me, and then let me go. I told him to quit, and he said nothing. I did not raise any kind of an outcry. I submitted to him in that way, because he had been pretending to make love to me so long that I really loved him. The reasons why I submitted to him as I did were, because he had flattered me and kissed me so many times and pretended to make love to me, that he had got me so I liked him. He had

sexual intercourse with me, I guess, a dozen times, and the result was I got in a family way."

The material inquiry is, whether this testimony had any tendency to prove that plaintiff was induced by any seductive influence, within the meaning of the law, to submit her person to defendant's embraces. If it did, she clearly had the right to have the verdict of the jury upon it. It has often been held that, to establish a charge of seduction, it must be made to appear that the intercourse was accomplished by some artifice or deception. Something more than a mere appeal to the lust or passion of the woman must be shown before the law will inflict the penalty prescribed for that crime, or afford her a remedy: *Gover v. Dill*, 3 Iowa, 837; *Delvee v. Boardman*, 20 Id. 446; *Brown v. Kingsley*, 38 Id. 220; *State v. Haven*, 43 Id. 181; *Baird v. Bochner*, 72 Id. 318. It was contended that the evidence had no tendency to bring the case within this rule; that with the most favorable construction in plaintiff's favor of which it is fairly capable, it did not tend to show either artifice or deception, but, on the contrary, showed merely a yielding to gross solicitation. But we think that view cannot be sustained. The evidence had some tendency, we think, to show that defendant, by his caresses and flatteries, first acquired an influence over her, by means of which he afterwards accomplished his purpose. It may be that the virtue of a pure woman of mature years would have been alarmed by his first approaches. Plaintiff, however, was but a child in years. She had the passions of a woman, but lacked the judgment and discretion which come only with age and experience. If the means made use of by defendant were calculated to overcome the will of a person of her years and experience, and were intended to create in her mind an affection for him, and they actually did have that effect, and if, under that influence, she yielded her person to him, this amounted to an "artifice," within the meaning of the law. And the question as to the sufficiency of the evidence to establish that fact was for the jury.

2. The court excluded certain evidence offered by plaintiff to prove that individual acquaintances with whom she had associated before the occurrence in question had refused to recognize her, or hold any social intercourse with her since her condition of pregnancy became known. That the loss of social standing which results from an injury of that character is a proper matter to be considered in estimating the dam-

age, is probably true. But the effect upon individual members of society cannot be shown for that or any other purpose. Some are inclined to look with charity and forbearance upon the victim of such a wrong, while others treat her with indifference or contempt. The loss of social standing, however, is the uniform result. This loss is matter of common knowledge, and may be taken notice of by the jury without proof. But the treatment of neither of the classes of individuals can be inquired into. For the error in withdrawing the case from the jury, the judgment will be reversed.

SEDUCTION. — WHAT CONSTITUTES THE OFFENSE: See extended note to *State v. Carron*, 87 Am. Dec. 405-411; *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822, and note; *People De Fore*, 64 Mich. 693; 8 Am. St. Rep. 863, and extended note 870 et seq., upon seduction as a crime defined in the various American statutes.

EVERTS v. DISTRICT TOWNSHIP OF ROSE GROVE.

[77 IOWA, 87.]

PAROL EVIDENCE TO CONTRADICT RECORDS OF PUBLIC CORPORATION NOT ADMISSIBLE IN COLLATERAL ACTION. — Parol evidence cannot be received in a collateral proceeding to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake therein as recorded. Where, therefore, the records of the annual meeting of the electors of a school district, and of a subsequent meeting of the directors of the district, show that certain orders for the payment of money were issued upon the authority of those bodies, parol evidence to show that no such action was taken by the electors at the annual meeting, and that the minutes of the meeting of directors were written by a member who was not the secretary, and who signed the names of the other directors thereto, is not admissible in an action brought against the district to recover therefrom the amount of the orders.

ELECTORS OF SCHOOL DISTRICT MAY RATIFY CONTRACT MADE BY DIRECTORS of the district, where the contract is one which they might have originally authorized the directors to make, even though the directors in entering into the contract exceeded the powers conferred upon them; and the subsequent action of the electors in authorizing the settlement of a controversy which grows out of the contract is a ratification.

POSSESSION OF SCHOOL SITE IS NOTICE TO SUBSEQUENT PURCHASERS. — The possession by a school district of a school-house site, under a contract with the owner of the land, is notice to subsequent purchasers or encumbrancers of its rights, and those rights are not divested by the transfer without reservation of the tract of land of which the site is a part.

SETTLEMENT AND ADJUSTMENT OF DISPUTED CLAIM IS VALID CONSIDERATION for the agreement to pay the amount of money agreed upon by the parties in the settlement.

ACTION on two orders drawn by the president and secretary of the defendant on its treasurer, directing him to pay a sum of money to E. L. Norris in one year from the date thereof, with interest at ten per cent. The petition alleged that the warrants were drawn in pursuance of a settlement of a disputed claim had between the defendant and the payee therein, and that this settlement was authorized by the electors of the district, which action was duly recorded. The answer denied this averment, and alleged that the orders were issued without consideration, and without authority of law. The district court directed the jury to find specially on a single question of fact, and upon that finding entered judgment for the plaintiff for the amount of the warrants. The defendant appealed.

D. D. Chase and J. L. Kamrar, for the appellant.

Martin and Wambach, for the appellee.

REED, C. J. The orders in suit were issued on the 12th of March, 1877. It appears that in 1868 the board of directors of the district township entered into a contract with S. L. Rose, by which he agreed to furnish ground for a school-house, and erect thereon a school-house for the district. The board, in making the contract, acted under a resolution adopted by the electors at the annual meeting in March, 1866. In 1869, Rose did erect a school-house on lands belonging to himself, which the district used for school purposes up to 1885. He did not, however, execute to the district either a lease or conveyance of the grounds, and he subsequently executed a mortgage to a third party on the farm on which the building was situated. He also subsequently conveyed the farm to Norris, the payee named in the warrants. He made no reservation of the ground upon which the school-house was situated, in either the mortgage or deed, and the mortgage was subsequently foreclosed, and the premises sold, and a sheriff's deed thereof was given to the purchaser. After the erection of the school-house a claim was made by Rose and Norris that the district was required by the terms of the contract to erect and maintain a fence around the grounds on which it was situated, and plant shade-trees thereon, and that they had been damaged by its failure to perform that part of the agreement, and plaintiff's claim is, that the warrants were issued upon a settlement of that claim, and in pursuance thereof. The warrants were issued on the day of the annual meeting of the electors in 1877, and the

single question of fact submitted the jury was, whether the president of the board of directors who signed the orders was present at the meeting of the board on that day. As that question, and the finding of the jury thereon, which was in the negative, is not claimed by either of the parties to be conclusive of the rights involved, the action of the court may be regarded as in effect a direction to the jury to return a general verdict for plaintiff. The principal question in the case, then, is, whether there was any evidence tending to establish the defenses pleaded. If there was, the parties had the right to have the question of its sufficiency passed upon by the jury.

In addition to the orders, which are *prima facie* evidence of indebtedness, plaintiff introduced what purported to be the record of the annual meeting of the electors in March, 1875, which recites the adoption of a resolution empowering and directing the board of directors to adjust and settle the claims of Rose and Norris in such manner as in the judgment of the members of the board shall be for the best interest of the district; also what purported to be the record of a meeting of the board of directors held on the day on which the warrants were issued, which recites an offer of compromise by Norris of his claim, and an acceptance by the board of that offer, and that the orders were issued in pursuance of that action. Defendant introduced several electors of the district, who testified that they were present at the annual meeting in March, 1875, and that no action whatever was taken by the electors with reference to said claims. It also offered evidence tending to prove that the alleged record of the meeting of the board of directors on the 12th of March, 1877, was in the handwriting of Rose, who, although a member of the board, was not its secretary, and that the signatures of the members of the board were appended to it by him.

If it were competent to contradict the record by parol, of course the evidence introduced would have presented a question for the jury. But "parol evidence in a collateral action cannot be received to contradict the records of a public corporation, required by law to be kept in writing, or to show a mistake in the matters as otherwise recorded": 1 Dillon on Municipal Corporations, sec. 299; *Third School Dist. v. Atherton*, 12 Met. 105; *Morrison v. Lawrence*, 98 Mass. 219; *Mayhew v. Gay Head*, 13 Allen, 129; *Durfey v. Hoag*, 1 Aiken, 286. We think, therefore, that the district court was right in disregarding the parol evidence as to the action taken by the elec-

tors. The meeting was one required to be held by the statutes, and it was the duty of the secretary to keep a record of the action taken by the electors thereat. If an incorrect record was made, the remedy was by correcting it at that or some subsequent meeting. But its correctness cannot be questioned in a collateral action.

It was contended, however, that the electors had no power to authorize the payment of the claim. This claim is based upon the fact that the authority conferred upon the board of directors by the meeting in 1866 was to contract with Rose for the erection of the school-house, and for the erection and maintenance of the fence around the grounds, so long as they should be used by the district, while the agreement actually entered into was that the district should erect and maintain the fence. But if it should be conceded that the board exceeded the powers conferred upon them in entering into the contract, their action was subject to be ratified by the district, and the action of the electors in authorizing the settlement of the controversy which grew out of it was a ratification.

It was also contended that the claim was absolutely without merit, and for that reason the warrants were without consideration. This claim is based upon the alleged fact that the district was divested of all right in the ground by the mortgage and subsequent conveyance of the farm in which it was included, the position being, in effect, that the undertaking of Rose to furnish grounds for the school-house constituted the consideration for the agreement of the district to build and maintain the fence, in so far as that agreement was beneficial to him. But it does not appear that the district was divested by the conveyance and mortgage. It was in possession when those instruments were executed, and both the mortgagee and purchaser were charged with notice of its rights. It does not appear ever to have been evicted from the premises, but continued in possession for many years after the foreclosure of the mortgage, and Norris's action in asserting the claim was in some sense a recognition of its rights. The settlement and adjustment of a disputed claim is a valid consideration for the agreement to pay the amount agreed upon by the parties in the settlement. We think that the action of the court in directing the verdict is right, and the judgment will be affirmed.

RECORDS, PAROL TESTIMONY WITH RESPECT TO. — The record of the conduct of convicts in a penitentiary may be corroborated by parol testimony, or even contradicted, if untrue; but when the record omits entirely to state whether the conduct of a convict was good or bad, such omission cannot be supplied by parol testimony: *State v. McClellan*, 87 Tenn. 52. In an action upon a foreign judgment, entered by a court having jurisdiction, it is incompetent to contradict, by parol testimony, the recitals of such judgment: *Caughran v. Gilman*, 72 Iowa, 570; nor is parol testimony admissible to establish that a judgment was rendered, nor to prove any of its recitals: *Cadwell v. Dullaghan*, 74 Id. 239. So in Texas, under the statute requiring the official oaths of executors and administrators, and all inventories of estates, to be recorded in full, giving the records, as well as certified copies of the same, the same effect as the originals, the loss of the originals will not authorize the reception of parol testimony as to their existence or contents: *Roberts v. Connelley*, 71 Tex. 11.

COMPROMISE OF A DISPUTED CLAIM is binding upon the parties as a mutual settlement, so far as the question of consideration is concerned: *Farmers' & M. I. Co. v. Chesnut*, 50 Ill. 111; 99 Am. Dec. 492.

POSSESSION AS NOTICE OF TITLE, or claim of title: *Andre v. Morrow*, 65 Miss. 315; 7 Am. St. Rep. 658, and note; *Wright v. Lassiter*, 71 Tex. 640.

RANDOLF v. TOWN OF BLOOMFIELD.

[77 IOWA, 50.]

ERROR IN OVERRULING MOTION TO MAKE PETITION MORE SPECIFIC WAIVED WHEN. — A defendant who answers after his motion for an order requiring the plaintiff to make the petition more specific has been denied thereby waives the error, if any there was, in overruling the motion.

NUISANCE TO HOMESTEAD, MEASURE OF DAMAGES FOR, NOT CONFINED TO RENTAL VALUE. — In an action to recover damages for a nuisance affecting the plaintiff's homestead, he is entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment thereof by himself and his family, and he is not limited to the damages sustained by the depreciation of the rental value of the property.

EVIDENCE THAT ANOTHER SEWER DID NOT PRODUCE OFFENSIVE SMELLS IS NOT ADMISSIBLE in an action for a nuisance caused by maintaining a sewer which emptied near the plaintiff's house, where it is not proposed to show that the two sewers were alike in their construction, and not subject to different conditions in their use.

ADMISSION OF EVIDENCE OMITTED BY OVERSIGHT, PRESUMPTION IN FAVOR OF. — Where the trial court permits the plaintiff, after he has rested his case, to introduce further evidence, on the ground of oversight, the appellate court will, in the absence of evidence to the contrary, presume that the court found it to be a case of oversight or inadvertence, and so admitted the evidence under the statute authorizing its admission in such a case.

PLAINTIFF, BY MAINTAINING ANOTHER NUISANCE OF HIS OWN, DOES NOT CONTRIBUTE to the injury caused by the maintenance of a nuisance by the defendant. The doctrine of contributory negligence does not apply to such a case.

ACTION to recover damages for a nuisance caused by the construction and maintenance, by the defendant, of a sewer which emptied into a street near the plaintiff's dwelling-house. Verdict and judgment for the plaintiff, from which the defendant appealed.

S. S. Carruthers and F. W. Moore, for the appellant.

Payne and Eichelberger, for the appellee.

BECK, J. 1. The cause will be disposed of by considering the objections made by defendants to the judgment in the order of their discussion by counsel. The petition alleges that the nuisance rendered plaintiff's dwelling "less habitable," and the smells emanating therefrom detracted from the enjoyment thereof, and produced "intolerable physical discomforts to plaintiff and his family, causing sickness in his family," to the great damage of plaintiff, etc. The defendant moved the district court for an order requiring plaintiff to make his petition more specific, so as to show the nature of the sickness of plaintiff's family, its duration, etc., and other matters. The motion was overruled. The defendant answered the petition, and thereby waived the error, if any there was, in overruling the motion: *Kline v. Kansas City etc. R'y Co.*, 50 Iowa, 656; *Coakley v. McCarty*, 34 Id. 105.

2. The district court held in the instructions that plaintiff was not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property, but was entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and his family. We think the instructions are correct. The premises which the nuisance affects were occupied by plaintiff and his family as his homestead. Surely it would be vain to endeavor to determine plaintiff's damages by inquiring as to the rental value of his homestead. It was not for rent, and may not have been so constructed or so located as to be sought for by tenants. Yet it may have been well adapted to the wants, convenience, and tastes of plaintiff and his family. To them it was a home, and the deprivation of the comforts enjoyed by plaintiff and his family could not be compensated by estimating its rental value alone: *Wood on Nuisances*, sec. 866; 3 *Sutherland on Damages*, 416; 5 *Am. & Eng. Ency. of Law*, p. 38, sec. 9, 2 b. *Brown v. Chicago etc. R'y Co.*, 80 Mo. 457; *Pierce v. Wagner*,

29 Minn. 355; *Emery v. Lowell*, 109 Mass. 197. The law requires that plaintiff be compensated for the injury he has sustained by the nuisance. This court has held that the measure of damages for trespass to real property is not complete unless the owner be compensated for the use and enjoyment, if he be deprived thereof: *Graessle v. Carpenter*, 70 Iowa, 166. While rental value may be the subject of inquiry in some cases in order to determine the damages, it is plain that when the enjoyment of a homestead, as in this case, was destroyed or diminished, the true rule for the measure of damages requires the owner to be compensated therefor. In *Shively v. Cedar Rapids etc. R'y Co.*, 74 Id. 169, 7 Am. St. Rep. 471, and in *Loughran v. City of Des Moines*, 72 Iowa, 382, instructions were approved which hold that recovery for the depreciation of the rental value of property occupied by the plaintiffs as a homestead, caused by a nuisance, may be recovered; but it is not held that no other element, as the deprivation of the comfortable enjoyment of the property, cannot be considered in determining the damages. No such question was made in either case. In the last-named case it was held that damages resulting from loss of time, and expenses incurred by sickness caused by the nuisance, should be allowed.

3. The defendant proposed to prove that another sewer of similar construction and use did not, at its outlet, produce offensive smells. The evidence was rightly excluded, for the reason, if no other, that the evidence did not propose to show that the two sewers were alike in the construction, and in their use were not subject to different conditions. The sewers may have been similar in their use and construction, and yet differ as to consequence of their use. It may be that if they were alike, or the same in their construction and use, the effects of the use of each would have been alike.

4. After plaintiff had rested his case, and before the argument to the jury had been commenced, the court permitted plaintiff, against defendant's objection, to introduce evidence to show the depreciation in the rental value of the property, caused by the nuisance. Counsel for defendant admit that if there had been any oversight in the introduction of the evidence it would have been rightly admitted under the statute. We will presume that the district court found it to be a case of oversight or inadvertence. The motion was based upon that ground, and in the absence of proof to the contrary, we

will hold that the court ruled rightly, and in so ruling found the existence of such oversight or inadvertence.

5. The defendant asked certain instructions intended to apply the doctrine of contributory negligence to the case, on the ground that plaintiff had maintained nuisances himself, which caused offensive smells upon his premises. The injury complained of by plaintiff is a nuisance maintained by defendant. Now, it is very plain that plaintiff, by maintaining another nuisance, would not contribute to the injury caused by defendant's nuisance. He would cause a separate and additional injury, resulting from wholly different acts from those done by defendant. He would not contribute to the injury done by defendant, but would commit another injury. It is very plain that the doctrine of contributory negligence does not apply to the case. But if plaintiff did maintain another nuisance, this should be considered in determining the extent of defendant's liability. Upon this point the district court gave the jury correct instructions.

6. The verdict is sufficiently supported by the evidence. While there is the usual conflict, it cannot be said that on any point there is an absence of all evidence to support the findings of the jury.

Affirmed.

NUISANCE, MEASURE OF DAMAGES IN CASES OF. — Where the nuisance is not necessarily a permanent one, but may be abated at any time by defendant, the measure of damages is the depreciation of the rental value of the premises while the nuisance existed: *Shively v. Cedar Rapids etc. R'y Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471, and note.

APPEAL AND ERROR — PRESUMPTION AGAINST ERROR. — Every presumption upon appeal is against error, and in favor of the regularity of the rulings and judgment of the lower court: *Gordon v. Donahue*, 79 Cal. 501; *Batchelder v. Baker*, 79 Id. 266; *Chesley v. Mississippi etc. Boom Co.*, 39 Minn. 83; *Gross v. Kelleher*, 80 Cal. 519; *Salisbury v. Bartleson*, 39 Minn. 365; *Buecher v. Eastern*, 41 Kan. 142; *Goyhineck v. Goyhineck*, 80 Cal. 410; *McCormick v. Holmes*, 41 Kan. 265; *McGregor v. Merrou*, 40 Id. 720; *Black v. Pratt*, 35 Ala. 504. But it will not be presumed, in support of a judgment, that it was rendered by consent; for consent must always appear affirmatively: *San Francisco San. Union v. Myers*, 76 Cal. 624.

EMPIRE MILL COMPANY v. LOVELL.

[77 IOWA, 100.]

WRONGFUL ATTACHMENT, MEASURE OF DAMAGES FOR. — If a debtor's goods are wrongfully seized and sold under an attachment, and the proceeds of the sale are applied in satisfaction of a judgment obtained against him by another creditor, the measure of his damages for the wrongful attachment is not the value of the property at the time of the seizure, but the difference between that value and the amount realized from the sale.

STATEMENTS AND ADMISSIONS OF AGENT ARE NOT ADMISSIBLE AGAINST HIS PRINCIPAL unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment. Therefore, statements made by one of a plaintiff's attorneys, made after an attachment was sued out, are not admissible as against such plaintiff to show malice in suing out the writ.

ADMISSION OF IRRELEVANT TESTIMONY, WHICH COULD NOT HAVE PRODUCED POSSIBLE PREJUDICE, is not ground for reversal.

ACTION on a money demand, in which the plaintiff sued out an attachment. The defendant pleaded a counterclaim on the attachment bond for the wrongful suing out of the writ and recovered. The plaintiff appealed.

Pillsbury, Moats, and Moats, for the appellant.

Cook and Filkins, and J. G. McOllough, for the appellee.

REED, C. J. 1. The property seized on the attachment was a stock of merchandise. On the day following that on which the writ was levied, defendant confessed judgment in favor of another creditor. An execution issued on that judgment was levied on the stock, and it was sold thereon; and at the time of the trial, the proceeds were held by the sheriff, to be applied as the court might direct. The court instructed that if the attachment was wrongfully sued out, the measure of defendant's actual damages would be the fair market value of the property at the time of the seizure. We are of the opinion that the rule adopted by the court on that question is erroneous. The injustice which would result from the application of such a rule is well illustrated by the present case. By the verdict and judgment, defendant recovers the full value of the property, which is in excess of the amount of his indebtedness to plaintiffs, the judgment being in his favor for the difference between those amounts. He also has the benefit of the proceeds of the sale, which may now be applied in satisfaction of the judgment in favor of the other creditor. The proceeds amounted to about one half the value of the

goods as shown by the invoice taken when the seizure was made; and the result, under the rule, is, that while, by the findings of the jury, the issuance of the writ was wrongful, defendant has been benefited by the seizure to the extent of one half the value of the property taken; and the same result would have followed if the sale had been made under the attachment, because of the perishable character of the goods. The debt to plaintiff would have been extinguished by the assessment against him of the value of the property at the time of the seizure, while the proceeds of the sale would have gone to defendant. It is manifest that, in either case, his recovery because of the wrong done him by the seizure of his property would be in excess of the actual damages caused by the act. But the true measure of his actual damages is such sum as will compensate him for the injury; and in the present case that sum could not exceed the difference between the market value of the property at the time of the seizure and the amount realized from the sale; and the rule would be the same if the difference should be less than the amount of the indebtedness to plaintiff, and a portion or all of the proceeds should ultimately go to the satisfaction of that balance; for in that case, defendant would have the benefit of it in the satisfaction of his indebtedness. The seizure of property under an attachment is not of itself an absolute conversion of it. The owner is deprived of possession by the seizure, and if wrongful, he may maintain an action for the trespass; but he is not divested of his title or ownership by the seizure alone. There must be a sale under the proceeding before that result is accomplished. If the seizure was wrongful, he is entitled to be compensated for the injury caused thereby. Before sale, the injury consists simply in the consequences of the deprivation of possession, including any depreciation in the value of the property. If the proceeds of the sale will inure either directly to him, or indirectly to his benefit, as when applied to the satisfaction of an indebtedness, the actual damages cannot exceed the difference between the proceeds of the sale and the value of the property at the time of the seizure.

2. Plaintiff is a non-resident of the state, and the proceedings were instituted by its attorneys resident in the state, the petition being sworn to by one member of the firm employed in the case. There was evidence proper to go to the jury that the attorney who verified the petition, and who did all that

was done in the matter, was actuated by malice towards defendant; and the court directed the jury that the motive of the attorney, if proven, would be imputed to plaintiff. Against plaintiff's objection, defendant was permitted to give evidence of certain statements of another member of the firm (of attorneys), made after the attachment was sued out, which tended in same degree to show the motive of his partner in suing it out. The evidence should have been excluded. It may be conceded that the one making the statements was responsible for the suing of the writ, because the act was done by his firm. The declarations, however, were not of the *res gestæ*, and the statements and admissions of an agent are not admissible against the principal, except they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment. The declarations in question related to a past transaction.

8. Defendant, when being examined as a witness in his own behalf, was inquired of as to his motive in confessing judgment in favor of the other creditor, and, against plaintiff's objection, was permitted to answer that he desired to secure to him the debt he was owing. The evidence, perhaps, was irrelevant, but we can see no possible prejudice which could have resulted from its admission. It could have no possible bearing on the questions involved in the issue, which related to the truth of the allegations of the petition for attachment, and the jury could not have been misled or influenced in their finding on these questions by it. As we reach the conclusion that the judgment must be reversed on the grounds indicated, we will not consider the question as to the sufficiency of the evidence to sustain the verdict.

Reversed.

MEASURE OF DAMAGES FOR WRONGFUL ATTACHMENT. — The defendant in an attachment wrongfully sued out is entitled to recover such damages as result to him from being dispossessed of his property during the time the levy was in force; and if there was malice in issuing the process he will be entitled to recover also exemplary damages: *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630; note to *Burton v. Knapp*, 81 Am. Dec. 472-474; *Monkey v. Haskin*, 39 Kan. 653. In an action for the wrongful attachment of a stock of goods, which had been sold under such process, and the proceeds applied upon plaintiff's debts, the sum thus applied should be deducted from the value of the property at the time of the wrongful seizure, and the remainder with interest at the legal rate will be the actual damages which should be awarded: *Mayer v. Duke*, 72 Tex. 445; *Crawford v. Nolan*, 72 Iowa, 673. Under the Iowa code, where there is a recovery on an attachment bond for

wrongfully suing out an attachment, plaintiff may be allowed an attorney's fee, although he only recovered nominal damages: *Lyman v. Landerbaugh*, 75 Id. 481.

PRINCIPAL AND AGENT — ADMISSIONS AND STATEMENTS OF AGENT. — The general rule is, that a principal is bound by the representations of his agent within the scope of his authority; and as to third parties who are affected by an agent's acts and words, it is the apparent scope of authority which must govern, rather than the agent's actual instructions: *Grissold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note; so a vendor who adopts a sale made by his agent is bound by any false representations made by the agent with respect to the property sold: *Riser v. Walton*, 78 Cal. 490. But statements of a railroad employee as to matters which happened during a railroad accident are not binding upon the company or admissible even as evidence, unless such statements were part of the *res gestæ*: *Railway Co. v. Sistrunk*, 85 Ala. 352. Yet declarations of an agent, made while he is acting as an agent in the transaction of his principal's business, are admissible against the principal: *Stager Mfg. Co. v. Belgart*, 84 Ala. 519; *Indiana etc. R. R. Co. v. Ad-amsen*, 114 Ind. 282.

HAWLEY v. PAGE.

[79 IOWA, 239.]

ACTION TO SET ASIDE FRAUDULENT CONVEYANCE IS BARRED IN FIVE YEARS FROM DISCOVERY of the fraud, and the fraud will be presumed to be discovered when such conveyance is filed for record, unless the plaintiff shows that the knowledge with which he is charged by the recording of the deed was not available to him as a basis for further inquiry, which would have led to the discovery of the fraud.

ACTION to subject certain real estate to the payment of a judgment. There was a decree for the defendants, and the plaintiff appealed.

Theodore Hawley, for the appellant.

Wright and Farrell, for the appellees.

GRANGER, J. On the sixth day of August, 1873, the defendant George E. Page, who was and is now the husband of the defendant Phoebe E. Page, owned the premises in question, and on that day the plaintiff obtained a judgment in the district court of Humboldt County against said George E. Page. On the tenth day of April, 1874, George E. Page conveyed the premises to his wife, by deed, and for a consideration therein expressed of five hundred dollars, which deed was filed for record March 28, 1876. Plaintiff avers that such conveyance to the wife was in fraud of his rights as a judgment creditor, and that his judgment should be decreed a lien thereon.

This action was commenced in July, 1884, and the defendants say the action is barred by the statute of limitation. No brief or argument is on file for appellees. Upon the question of the plea of the statute of limitations, appellant concedes that if the case of *Laird v. Kilbourne*, 70 Iowa, 83, is in point, it is conclusive of this case, and he says that under the rule there laid down the defendants have established their plea. With reference to that case, it may be well here to remark that the language of the opinion, construed abstractly, announces a rule broader than the court intends. As applied to the facts of that case, the rule is correct. Viewed in the light of the plea under consideration, we think the facts of the two cases are not essentially different. In that case there was a debt against the husband, after which he transferred the premises to his wife. It may be added that in that case the husband, at the time of the conveyance, was insolvent. The deed was duly recorded, of which the plaintiff Laird was required to take notice. At the time of the deed being placed on record, he knew that he was a creditor. These are the exact facts in the case at bar. The plaintiff, in legal contemplation, knew of the recording of the deed by which his judgment debtor conveyed his lands to his wife. The record further discloses that the deed was not recorded for nearly two years after its execution. These facts are urged as indications or badges of fraud, which we may admit. They were known to the plaintiff, and we think they constitute knowledge or a discovery of fraud within the meaning of the law. The law certainly does not contemplate such a discovery as would give positive knowledge of a fraud, but such a discovery as would lead a prudent man to inquiry or action. To hold that the discovery must amount to absolute knowledge of the fact of fraud would be to render the statute practically inoperative, as such knowledge is rarely had before the facts are established by adjudication. We are not required to decide just how much knowledge is necessary to constitute a discovery of the fraud, so as to put in operation the running of the statute, and it is sufficient to say that the knowledge of plaintiff in this case, in the absence of a showing on his part that it was unavailable as a basis of further inquiry and proceeding was a discovery of the fraud, and that his action is barred: See *Gebhard v. Sattler*, 40 Iowa, 152; Angell on Limitations, sec. 187.

The judgment of the district court is affirmed.

IN THE CASE of *Francis v. Wallace*, 77 Iowa, 373, it was decided that fraud in the conveyance of a minor's land by his guardian, under order of court, is presumed to be discovered when the deed is filed for record; and that the ward cannot maintain an action to set it aside seven years after reaching his majority, and when it would otherwise be barred by the statute of limitations, on the ground that he did not sooner discover the fraud. Compare *Jacobs v. Snyder*, 76 Iowa, 522; *ante*, p. 235, and note. The concealment of a right of action for relief against fraud which will extend the period of limitation for bringing the action must be an affirmative concealment, something more than mere silence: *Miller v. Powers*, 119 Ind. 80. In Kentucky, an action to set aside a judgment upon the ground of fraud is barred after the lapse of ten years from rendition thereof, no matter when the fraud was discovered: *Kellar v. Stanley*, 86 Ky. 240.

ORR v. O'BRIEN.

[77 IOWA, 253.]

HIGHWAY — EXTINGUISHMENT OF RIGHT TO BY NON-USER AND ADVERSE POSSESSION. — The entire non-user by the public, for a period of ten years, of a highway, and the actual, open, notorious, and adverse possession thereof by a party for the same length of time, will estop the public from thereafter claiming any right therein against such party or those claiming under him.

ACTION to enjoin the obstruction of a public highway. The line of the public highway was established in 1864, but the road was never opened up or worked by the public. What travel there had been was over the adjacent open country, without reference to the established line. The defendant and her immediate devisor owned and occupied the land on both sides of the line for more than ten years prior to the bringing of this suit, and for more than ten years maintained a fence that inclosed that part of the line. A short time before the commencement of this suit the defendant extended her fence so as to obstruct travel over the ways by which it had theretofore passed. The plaintiff had such interest in this highway as to entitle him to maintain this action. Other facts are stated in the opinion.

J. W. Jamison, for the appellant.

Sheean and McCarn, for the appellee.

GIVEN, C. J. 1. "Mere non-user of an easement of this character, and acquired in this manner, will not operate to defeat the right. Especially is this so when there is no use of the premises adverse to the right of the public": *Davies v. Huebner*, 45 Iowa, 574. The mere fact that the road was not opened or worked or traveled on the established line does not

bar the public from now asserting the right to do so. In that same case it was insisted that as for more than ten years before the commencement of the suit the owners of the adjacent lands had been in actual, open, notorious, and adverse possession of one half in width of the road in question, without objection by the public, that was an extinguishment of the right of the public as to that part of the road. This court held that "there are cases where the non-user has continued for such a length of time, and private rights of such a character have been acquired by long-continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands the public should be estopped from asserting the right to open the highway. The first requisite to establish such an estoppel should be that the adverse possession should continue for more than ten years by analogy of the statute of limitations. Then it should be shown that there was a total abandonment of the road for at least a period of ten years." In the case at bar there was an entire non-user of that portion of the road in controversy from the year 1864 to the present, and actual, open, notorious, and adverse holding of possession by the defendant and her devisor for more than ten years. Under these circumstances, we believe the public should be estopped from claiming any right in the part of the line thus inclosed, and that the defendant has a right to extend her fences to the hindrance of travel over the adjacent lands.

Affirmed.

EXTINGUISHMENT OF HIGHWAYS AND OTHER EASEMENTS THROUGH NON-USER OR BY OPERATION OF THE STATUTE OF LIMITATIONS. — The question whether or not the right of a municipal corporation to lands dedicated to the public use for streets, highways, parks, and public places may be extinguished by non-user or by operation of the statute of limitations, is one upon which there is a decided conflict of judicial opinion. One line of authorities holds that such right cannot be extinguished by any adverse possession, however long continued, and that no title to such lands can be acquired through the operation of the statute of limitations: *Hoadley v. San Francisco*, 50 Cal. 265; *San Francisco v. Sullivan*, 50 Id. 603; *People v. Pope*, 53 Id. 437; *Visalia v. Jacobs*, 65 Id. 434; 52 Am. Rep. 303; *Cohn v. Parcels*, 72 Cal. 367; *Mayor etc. of Jersey City v. Morris Canal and Banking Co.*, 12 N. J. Eq. 547; *Tainter v. Mayor of Morristown*, 19 Id. 46; *State v. Common Council of Trenton*, 36 N. J. L. 198; *Price v. Inhabitants of Plainfield*, 40 Id. 608; *Burbank v. Fay*, 65 N. Y. 57; *Commonwealth v. McDonald*, 16 Serg. & R. 390; *Commonwealth v. Alburger*, 1 Whart. 469; *Barter v. Commonwealth*, 3 Peur. & W. 253; *Kopf v. Utter*, 101 Pa. St. 27; *Commonwealth v. Moorehead*, 118 Id. 344; 4 Am. St. Rep. 599; *Simmons v. Cornell*, 1 R. I. 519; *Sims v. Chattanooga*, 2 Lea, 694. In delivering the opinion of the court in *Hoadley v. San Francisco*, 50 Cal.

274, Rhodes, J., said: "When lands have been held adversely under such circumstances and for such a period that the title held by a private person, or by a municipality, or by the state as a private proprietor, would be extinguished under the operation of the statute of limitations, will such adverse possession also extinguish a public use if the lands have been dedicated to that purpose? Will it also bar the rights which the public gained by the dedication? We are of the opinion that the question must be answered in the negative. The statute of limitations was not intended as a bar to the assertion by the public of rights of that character." And Gibson, C. J., delivering the opinion of the court in *Barter v. Commonwealth*, 3 Penr. & W. 253, said: "The title of the corporation to the soil for uses that conduce to the public enjoyment and convenience is paramount and exclusive; and no private occupancy, for whatever time, and whether adverse or by permission, can vest a title inconsistent with it. The case of *Commonwealth v. McDonald*, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities." And the following authorities hold that encroachments upon public streets, highways, and parks are nuisances, which, however long continued, can never ripen into a prescriptive title to the land so encroached upon: *Vialia v. Jacobs*, 65 Cal. 434; 52 Am. Rep. 308; *Henshaw v. Hunting*, 1 Gray, 203; *Cross v. Mayor etc. of Morristown*, 18 N. J. Eq. 305; *Tainter v. Mayor of Morristown*, 19 Id. 46; *State v. Common Council of Trenton*, 36 N. J. L. 198; *Burbank v. Fay*, 65 N. Y. 57; *St. Vincent Orphan Asylum v. City of Troy*, 76 Id. 108; 32 Am. Rep. 286; *Commonwealth v. McDonald*, 16 Serg. & R. 390; *Rung v. Shoneberger*, 2 Watts, 23; 26 Am. Dec. 95; *Penny Pot Landing v. City of Philadelphia*, 16 Pa. St. 79; *County of Susquehanna v. Deane*, 23 Id. 131; *Kittaning Academy v. Brown*, 41 Id. 269; *City of Philadelphia v. Philadelphia etc. R. R. Co.*, 58 Id. 253; *Commonwealth v. Moorhead*, 118 Id. 244; 4 Am. St. Rep. 599; *Mayor etc. of Memphis v. Lenora*, 6 Cold. 412; *Taylor v. Commonwealth*, 29 Gratt. 780; *Yates v. Town of Warrenton*, 84 Va. 337; 10 Am. St. Rep. 860.

Another line of authorities, however, holds that adverse possession of a public street, highway, or park, if continued for the period required by the statute of limitations to give an individual title to lands, will give a good title to the occupant as against a municipal corporation, and that the statute of limitations runs against such corporations the same as it does against private persons: *City of Fort Smith v. McKibbin*, 41 Ark. 45; 48 Am. Rep. 19; *Inhabitants of Litchfield v. Wilnot*, 2 Root, 288; *City of Peoria v. Johnston*, 56 Ill. 45; *Chicago etc. R. R. Co. v. City of Joliet*, 79 Id. 25; *City of Pella v. Scholtz*, 24 Iowa, 283; 95 Am. Dec. 729; *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232; *Dudley v. Trustees of Frankfort*, 12 Id. 610; *Alves's Ex'rs and Heirs v. Town of Henderson*, 16 Id. 131; *Webber v. Chapman*, 42 N. H. 326; 80 Am. Dec. 111. But see *State v. Franklin Falls Co.*, 49 N. H. 256; *Armstrong v. Dalton*, 4 Dev. 568; *City of Cincinnati v. Evans*, 5 Ohio St. 594; *Bowen v. Team*, 6 Rich. (S. C.) 298; *City of Galveston v. Menard*, 23 Tex. 349; *Knight v. Heaton*, 22 Vt. 480; *City of Wheeling v. Campbell*, 12 W. Va. 36. Hise, J., delivering the opinion of the court in *Dudley v. Trustees of Frankfort*, *supra*, said: "If a private individual or citizen has been permitted to remain in the continued, adverse, actual possession of public ground, or of a public street, or part of a street, as embraced within his inclosures, or covered by his dwelling or his other buildings, for a period of twenty years or more, without interruption, such citizen will be vested thereby with the complete title to the ground so actually occupied by him, and a title thus perfected by time will be just as available against a municipal corporation as it

would be against an individual whose elder title and right of entry may be barred by a continued adverse possession for twenty years of his land; a municipal corporation, or any other artificial body vested with corporate rights and functions, has no more right than a natural man to claim the benefit and advantage of the maxim, *Nullum tempus occurrit regi*."

Judge Dillon, in his work on municipal corporations, after reviewing the decisions upon the subject under discussion, says: "Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character, — one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for a tort, a municipal corporation may plead, or have pleaded against it, the statute of limitations. But such corporation does not own and cannot alien public streets or places, and no laches on its part, or on that of its officers, can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public. But if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require": 2 Dillon on Municipal Corporations, 3d ed., sec. 675.

There is one point upon which all the authorities are agreed, that is, that as to property which is held by a municipal corporation as a private proprietor, and not upon any public trusts, and as to contracts or rights of a private character, or as to torts, municipal corporations stand on the same footing with private persons, and are subject to the same limitations and prescriptions as private individuals or corporations: *Powers v. Council Bluffs*, 45 Iowa, 652; *Evans v. Erie County*, 66 Pa. St. 222. But as to lands the title to which is vested in a municipal corporation for the use and benefit of the public generally, and as to lands which it is incapable of alienating, it is held by several authorities that no prescriptive right thereto can be acquired, because prescription presupposes a title fairly acquired, but now become incapable of proof: *Visalia v. Jacobs*, 65 Cal. 434; 52 Am. Rep. 303; *City of Alton v. Illinois T. Co.*, 12 Ill. 38; 52 Am. Dec. 479; *Logan Co. v. Lincoln*, 81 Ill. 158; *Cheek v. City of Aurora*, 92 Ind. 107; *Mayor v. Magnon*, 4 Mart. 2; *Mayor etc. of Thibodeau v. Maggioli*, 4 La. Ann. 73; *Ingram v. Police Jury of Parish of St. Tammany*, 20 Id. 226; *Sims v. Chattanooga*, 1 Lea, 694. In *Visalia v. Jacobs*, *supra*, the court said: "After a street has been legally laid out and dedicated, the municipal government retains, or acquires, a right of entry as agent of the public, clothed with the trust and duty of protecting and regulating the public use. The right of possession is held by the corporation for the benefit of the public, and this right cannot be conveyed to any private person. The lands so held are as effectually withdrawn from commerce while the street continues as are those spoken of in

Hoadley v. San Francisco. As the municipality cannot convey the title, or relieve itself of the trust, private persons are virtually precluded from acquiring it."

Other authorities, however, hold that the common-law maxim, *Nemo tempus occurrit regi*, is restricted to sovereignty, and does not apply to municipal corporations under any circumstances: *City of Pella v. Scholte*, 24 Iowa, 283; 95 Am. Dec. 729; *Dudley v. Trustees of Frankfort*, 12 B. Mon. 610; *Clements v. Anderson*, 46 Miss. 581; *County of St. Charles v. Powell*, 22 Mo. 525; 66 Am. Dec. 637; *School Directors of St. Charles Township v. Goeryca*, 50 Mo. 194; *Lessee of City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; 32 Am. Dec. 718. Dillon, C. J., in delivering the opinion of the court in *City of Pella v. Scholte*, *supra*, said: "It is well understood that statutes of limitations do not constructively apply to the state or sovereignty; but the principle has not, so far as we know, been extended to municipal or public corporations." But from the extract quoted above from the learned judge's work on municipal corporations, it will be seen that he subsequently modified his views on the subject. The learned judge who delivered the opinion of the court in *City of Wheeling v. Campbell*, referring to this change of opinion on the part of Judge Dillon, said: "We think he was right in his opinion, and wrong in his text-book. The judge in this case is better than the author." The middle ground suggested by Judge Dillon in the section above referred to, that although municipal corporations, as respects public rights, may not come within the legal operation of limitation enactments, yet cases may arise in which justice will require the assertion of an equitable estoppel even against the public, has been approved in a number of cases decided since the publication of his work: *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25; *Logan Co. v. Lincoln*, 81 Id. 156; *Leroy v. Springfield*, 81 Id. 114; *Chicago etc. R. R. Co. v. Elgin*, 91 Id. 251; *Quincy v. Chicago etc. R. R. Co.*, 92 Id. 21; *Brooks v. Riding*, 46 Ind. 15; *Hamilton v. State*, 106 Id. 361; *Davis v. Huebner*, 45 Iowa, 574; *Simplot v. Dubuque*, 49 Id. 630; *Sims v. Chattanooga*, 2 Lea, 694. In the case of *Hamilton v. State*, *supra*, Mitchell, J., delivering the opinion of the court, said: "While it is true that the statute of limitations operating alone may not bar the right of the public to insist upon the use of a highway, yet, if such appearances are created by non-user, as that acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own that which is in fact a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped."

NON-USER OF STREET OR HIGHWAY, EFFECT OF. — Of course in those states where it is held that no length of adverse possession bars the public right to streets and highways, no mere non-user can give any title as against a municipal corporation, but even in states whose courts hold that the maxim, *Nemo tempus occurrit regi*, does not apply to such corporations, it is held that mere non-user of the whole or a part of a highway does not prevent the public from asserting and maintaining its right thereto, not at least until the time arrives when the street or highway, or any part of it, is required for public use, and the public authorities may be properly called upon to open it for public use: *Town of Derby v. Alling*, 40 Conn. 410; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Chicago etc. R. R. Co. v. City of Joliet*, 79 Id. 25; *Cheek v. City of Aurora*, 92 Ind. 107; *Bartlett v. Bangor*, 67 Me. 460; *Henshaw v. Hunting*, 1 Gray, 203; *Barnes v. Lloyd*, 112 Mass. 224; *Reilly v. City of Racine*, 51 Wis. 526; *State v. Leaver*, 62 Id. 387. Endicott, J., in delivering the

opinion of the court in *Barnes v. Lloyd*, 112 Mass. 231, said: "A right of way established by grant is not lost by mere non-user. Unless the non-user is a consequence of something which prevents the user, and is utterly inconsistent with its enjoyment, it continues to exist, although more than twenty years have elapsed." In Michigan, however, it is held that a highway or any portion of it may be lost by non-user alone: *Gregory v. Knight*, 50 Mich. 61; *Lyle v. Lesia*, 64 Id. 16; *Coleman v. Flin' etc. R. R. Co.*, 64 Id. 160; see also *Commissioners v. Taylor*, 2 Bay, 282; 1 Am. Dec. 647; and in *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86, it was held that non-user of a highway for many years is *prima facie* evidence of a release of the right to the person over whose land it once ran. In Ohio, it is held that non-user must have continued twenty-one years, to give the adverse possessor title: *Lane v. Kennedy*, 13 Ohio St. 42; *Kelly Nail and Iron Co. v. Lawrence Furnace Co.*, 46 Id. 544. In the former of these cases, where an adjoining owner inclosed with a fence a part of the highway not then needed for the use of the public, it was held that his encroachment was not necessarily adverse to the public, nor inconsistent with its easement, and did not constitute a bar to its reclamation by the supervisor when required by the public travel. Peck, J., in delivering the opinion of the court in that case, said: "There was nothing in the character of the improvement which indicated an intention to *permanently* appropriate the land. It was a mere fence; and, as the bill of exceptions informs us, a *worm-fence*, and *crooked at that*. He carefully avoided inclosing any part of the road actually used by the public. He infringed no right which was then enjoyed or apparently desired. Nothing was done to excite the apprehension of the public, or to call for its protest. We hear of no *declarations*, and all his acts were consistent with a *temporary* occupancy, by the *permission* or the mere *sufferance* of the public, till the land should be required for its use." In *State v. Wertzel*, 62 Wis. 184, it was held that the failure of the supervisors to compel the removal of a fence which encroached on a highway for five years was not such an abandonment of the highway as relieved the adjoining owner from the obligation to remove the fence. In *Watkins v. Lynch*, 71 Cal. 21, it was held that sowing grain and pasturing cattle on the sides of a public road-bed are not sufficient to show either an abandonment of the use of the road by the public, or its adverse possession by the person doing such acts.

EASEMENT. — In the note to *Cooper v. Smith*, 11 Am. Dec. 663, it is shown that an easement cannot be acquired by the operation of the statute of limitations, and it would seem that the same rule ought to apply as to the extinguishment of an easement. In *Eddy v. Chace*, 140 Mass. 471, it was held that mere non-user of a mill privilege for more than twenty years would not extinguish it. Morton, C. J., who delivered the opinion of the court, said: "The owner of an easement may abandon it, but mere non-user does not show an abandonment; to produce this effect, the non-user must originate in or be accompanied by some decided and unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandonment." In *State v. Franklin Falls Co.*, 49 N. H. 240, it was held that no right will be acquired against the state by the obstruction of a public highway, though continued for more than twenty years under a claim of right, if such obstruction in fact originated without right. But in *Willey v. Norfolk S. R. R. Co.*, 96 N. C. 408, it was held that disuse for twenty years will raise a presumption of a surrender or extinction of an easement.

COLE v. GREEN.

[77 IOWA, '87.]

CHattel Mortgage Valid as to Sheriff Having Actual Notice, Though Defective in Description of Property. — Though a chattel mortgage may be so defective in its description of the property mortgaged as not to constitute sufficient notice to a purchaser, it will be valid as to a sheriff who has actual notice of the mortgage before levying upon the property.

ACTION to recover from the sheriff certain property taken by him under an attachment. The opinion states the case.

P. R. Bailey, for the appellant.

Alfred Morton and O. M. Barrett, for the appellee.

GIVEN, C. J. 1. The plaintiff, F. G. Cole, brings this action to recover the possession of certain chattel property from the defendant, W. C. Green, sheriff, who took the same under an attachment as the property of George Wall. The plaintiff claims the property by virtue of a chattel mortgage from Wall to him. The parties waived a jury, and the case was submitted to the court, and judgment entered against the defendant, and defendant appeals, assigning as errors, — 1. That the court erred in rendering judgment against the defendant, for the reason that there was no notice to defendant of the existence of said mortgage upon the stock of goods, either actual or constructive, prior to the levy of the attachment; 2. That the court erred in rendering judgment against the defendant, for the reason that the evidence shows that the mortgage given by Wall to Cole was fraudulent, and given for the purpose of aiding Wall to defraud his creditors, and was without consideration; 3. That said mortgage did not impart notice of record, for the reason that the same was void for want of proper description and location. The mortgage is upon "all my restaurant stock, consisting of candies," etc., describing the property particularly, "now in use in said restaurant, which is located on lot No. 15, in block 13." There is no other location given. The judgment shows that the court found that the defendant sheriff, through his deputy, who levied the attachment, had actual notice of the existence of the mortgage prior to the making of the levy, and thus the court might very properly have found from the testimony, though there is conflict with regard to it. "The mortgage, which is so indefinite as to the description of property that the record thereof would not constitute sufficient notice to a purchaser, may

nevertheless be valid between the parties who are aware of the facts": *Clapp v. Trowbridge*, 74 Iowa, 550. It follows that the defendant having actual notice of this mortgage before making the levy, the mortgage is valid as to him, notwithstanding its defective description of the property. This being the case, it is immaterial as to these parties whether the mortgage had been recorded or not. The court found that the mortgage was not fraudulent. This finding is not without support in the testimony, and under the well-settled rule we cannot interfere with it. The judgment of the district court is affirmed.

NOTICE. — THE RECORD OF A TAX DEED void upon its face does not impart notice to anybody: *Oglesby v. Holbster*, 76 Cal. 136; 9 Am. St. Rep. 177, and note; but actual notice accomplishes the effect of registration, and dispenses with it: *Hoge v. Hubt*, 94 Mo. 489. Compare *Hibbard v. Zenor*, 75 Iowa, 471; 9 Am. St. Rep. 497, and note; *Sandford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748; *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note. Actual notice to an officer that chattels upon which he is about to levy an attachment are mortgaged is sufficient to put him upon inquiry, even though he does not know to whom the mortgage was given: *Coleman v. Reel*, 75 Iowa, 304; 9 Am. St. Rep. 484.

REGISTRATION AS NOTICE. — A purchaser of realty takes with constructive notice of recorded deeds, and of *lis pendens*, where a notice of the same is recorded, regardless of any actual notice, or of the question whether or not the instrument imparting notice appeared in the abstract of title given to him upon payment of purchase-money and delivery of the deed: *Pearson v. Creed*, 78 Cal. 145.

WEST v. WARD.

[77 IOWA, 823.]

PROXIMATE CAUSE OF INJURY. — Where a person wrongfully and negligently opens, and leaves open, the fence of an inclosure surrounded by a country largely fenced with barbed wire, which is especially dangerous to valuable horses running at large, and a highly bred mare escapes from such inclosure through the opening in the fence, and is injured by becoming entangled in a barbed-wire fence, the wrongful and negligent act of such person in opening and leaving open the fence is the proximate cause of the injury.

ACTION to recover damages for injuries to a valuable, highly bred mare. The opinion states the facts.

Edmond Nichols and R. S. Barr, for the appellant.

White and Clarke, for the appellee.

BECK, J. 1. The petition alleges, substantially, that plaintiff was the lessee of certain pasture-land, wherein he kept certain

valuable horses, among others a highly bred and well-trained young trotting mare of great value; that defendant unlawfully went upon the premises, wrongfully and negligently opened the fence inclosing it, and left it open, which permitted the young mare to escape from the pasture; that the country surrounding the pasture was largely fenced with barbed wire, which is dangerous to stock running at large, and that the mare, in attempting to return to the locality from which she had been brought, became entangled in a barbed-wire fence, and was severely cut and wounded, so that her value was almost destroyed. The evidence tends to support the allegations of the petition, showing that the country about the pasture was largely fenced with barbed wire, which is dangerous to stock, especially those running at large. The defendant moved the court for a verdict in his behalf on the following grounds: "1. The evidence introduced by the plaintiff fails to show that the wrong of the defendant of which the plaintiff claims is the proximate cause of the injury for which he sues; 2. The evidence of the plaintiff shows affirmatively that the wrong of the defendant of which the plaintiff pleads is not the proximate cause of the injury for which plaintiff sues, but that it is the result of an independent cause; 3. No evidence has been introduced tending to show that the injury of which the plaintiff claims is the usual and ordinary, natural and probable and approximate, result of the alleged wrongful conduct of the defendant." This motion was sustained, and a verdict accordingly returned, upon which a judgment was rendered for defendant.

2. We need not determine whether the question of the sufficiency of the evidence to show that the act of defendant in opening the fence was the proximate cause of the injury, and the usual, ordinary, natural, and probable result of the defendant's act, was exclusively for the court or for the jury. Upon this question, see *Dubuque Wood etc. Ass'n v. City and County of Dubuque*, 30 Iowa, 176; *Knapp v. Sioux etc. R'y Co.*, 71 Id. 41; *Handelun v. Burlington etc. R'y Co.*, 72 Id. 709; *Bosch v. B. & M. R'y Co.*, 44 Id. 402; 24 Am. Rep. 754; *Scheffer v. Washington etc. R'y Co.*, 105 U. S. 249. If the record before us shows that defendant's act was the proximate cause of the injury, and should have been so found, the direction of the court requiring a verdict for defendant is erroneous. We are therefore to inquire whether the evidence shows that the injury to the mare was the usual, ordinary, natural, and

probable result of defendant's act in opening the fence of the pasture.

3. The plaintiff's mare was kept in the inclosure of the pasture, not only that she might graze, but also that she might be protected from the dangers to such property resulting from her running at large. These dangers are many and obvious. Among them is the danger from barbed-wire fences, which, the evidence tends to show, especially exists as to horses of her kind running at large. If she had been kept in the inclosure of the pasture, these dangers as to her would not have existed. When, through the defendant's act, she was permitted to run at large, the dangers commenced, and ended in the injury. The animal was exposed to the danger of barbed-wire fences as soon as she commenced running at large. It is plain that defendant's act exposed the mare to the danger; and it is equally plain that the injury resulted from the act. It is also plain that this injury was the proximate result of defendant's acts, for it immediately followed that act as a sequence. It was the usual, ordinary, natural, and probable result; for the evidence tends to show that it was dangerous to permit horses of this kind to run at large. The word "dangerous" means "attended with danger, perilous, full of risk," etc. Where there is danger, peril, risk of a particular injury, which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger and peril. In the case before us the mare was not exposed to danger of injury before she was permitted to run at large. Defendant's acts exposed her to danger of the injury. The injury followed without any intervening act adding to the danger or aiding to bring the animal within the exposure thereto. Surely defendant's act in breaking the fence, and thus permitting the mare to run at large, was the direct and proximate cause of the injury. We reach the conclusion that the district court erred in directing the jury to return a verdict for defendant. The judgment is therefore reversed.

PROXIMATE CAUSE OF INJURIES—INSTANCES OF: See extended note to *White v. Conly*, 52 Am. Rep. 157-166; extended note to *Campbell v. City of Stillwater*, 50 Am. Rep. 569-574; *Smethurst v. Proprietors etc. Congregational Church*, 148 Mass. 261; 12 Am. St. Rep. 550; *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note. When two causes co-operate to produce an injury, the proximate cause is the originating and efficient cause, which sets the other cause in motion: *Lapline v. Morgan's etc. R. R. & S. S. Co.*, 40

La. Ann. 681; that is, the cause, without which the injury would not have occurred: *Taylor v. Baldwin*, 78 Cal. 517. In an action against a railroad contractor for damages resulting from fire caused by his negligence, the proximate cause alone must be considered, and by proximate cause is meant that the damages complained of must have been the direct and natural consequence of the contractor's negligence, without any intervening force operating to occasion the injury: *Ryan v. Gross*, 68 Md. 377. But where a complaint alleged that "defendant, a railway company, had unnecessarily constructed its tracks, and had for more than ten years operated its line of road, along a certain street, never having restored the highway to its normal and former condition; that the tracks rendered the street unsafe by reason of its narrowed condition, and at a certain point so narrowed such street as to make it wide enough for only one team; that by reason of this state of affairs, plaintiff, while walking along such street at such point, was run over and injured by a team, driven by a careful driver, but frightened by a noisy approaching freight train; that plaintiff was walking out in the street, because the sidewalk was impassable by reason of deep snow-drifts,"—such complaint did not state a cause of action, because the failure of the railway company to restore the street to its former condition was not the proximate cause of the injury complained of: *McCandless v. Chicago etc. R'y Co.*, 71 Wis. 41. In actions for damages resulting from injuries occasioned by the acts and negligence of others, it is not necessary to allege in terms that the injury complained of was the proximate result of the negligence: *Missouri P. R'y Co. v. Lee*, 70 Tex. 496.

WILLIAMS v. WESCOTT.

[77 IOWA, 332.]

MOTION TO SET ASIDE ORDERS AND DECREES MADE THROUGH FAILURE OF COUNSEL TO APPEAR AND MAKE RESISTANCE, DENIED WHEN. — Where the attorneys for a party, against whom orders and decree were entered owing to the failure of such attorneys to appear and resist the making thereof, resided several hundred miles from the place where the court in which the cause was pending was held, and, prior to the making of such orders and decree, wrote a letter to the clerk asking to be advised of papers filed, and to have copies sent, "if not too much trouble," which letter, though written nearly three weeks before the term commenced, was never answered, and the attorneys took no further steps to inform themselves of the condition of the case until after the decree was rendered, their failure to be present and make resistance will be deemed inexcusable, and the motion to set aside the orders and decree will be denied.

SHOWING OF MERITS, INSUFFICIENT WHEN. — An affidavit made in support of a motion to set aside a default judgment, by one of the attorneys of the party against whom the judgment was rendered, which does not add materially to the showing of merits made by the pleadings, is insufficient.

PARTITION PROCEEDINGS VALID AS TO PARTIES IN COURT. — Proceedings in partition are not void or voidable as to parties who are actually or constructively in court, even though the court does not acquire jurisdiction of all the parties interested in the real estate. If the persons not made parties are satisfied, those who were cannot be heard to complain.

SERVICE BY PUBLICATION IN PARTITION CASES IS EXPRESSLY authorized by the Iowa code, and is sufficient as to non-resident minors; and if a guardian *ad litem* is appointed and answers for them, the judgment will conclude them.

PARTY TO PARTITION ESTOPPED BY ACQUIESCENCE AND ACCEPTANCE OF SHARE. — If parties to a suit in partition acquiesce in the proceedings, and receive and retain their shares of the proceeds, they will be estopped from afterwards questioning the validity of the proceedings, as will one who takes a conveyance from them with knowledge of the facts.

DOWER EXTINGUISHED BY PARTITION SALE AGAINST HUSBAND. — A sale of land in partition proceedings is a judicial sale, and such a sale of a husband's interest in land in a proceeding to which he is a party extinguishes the wife's right of dower therein, although she was not made a party to the proceeding.

ACTION in equity to set aside a decree and certain orders.
The opinion states the case.

Parsons and Perry, for the appellants.

Craig L. Wright, for the appellees.

ROBINSON, J. The petition states that on the fifteenth day of July, 1882, Jesse L. Williams, a resident of the state of Indiana, was the owner of an undivided one half of the east half of the northeast quarter of section 20, township 89, range 47, in Woodbury County; that defendant George E. Wescott was then the owner of an undivided one fourth of said tract, and that an undivided one fourth thereof was owned by forty-three persons as tenants in common, and as heirs of Israel G. Lash, deceased, all of whom were non-residents of the state of Iowa; that of said heirs sixteen were minors; that on said date defendant Wescott commenced an action in the circuit court of Woodbury County for the partition of said real estate, making all of said persons, excepting Lucie D. Douthit, parties defendant, and also making one John P. Allison, as guardian of said minors, a defendant; that said Allison acknowledged service of the original notice, but that as to all the other defendants it was served by publication only; that Allison was not in fact the guardian of said minors, nor was he authorized to represent them; that said court found that due service of the original notice had been made; that it appointed a guardian *ad litem* for twelve of the minors, who filed answer as such guardian; that it found said Wescott was the owner of an undivided one fourth of said premises, the said Jesse L. Williams the owner of an undivided one half, and the remaining defendants, or heirs of Lash, the owners of an un-

divided one fourth thereof, and appointed referees to make partition of the same.

The petition further alleges that the premises in question were sold by the referees; that the sale was confirmed as made to defendant John Pierce, but that it was in fact made without due authority, and without sufficient notice; that the order confirming the sale was made without notice to the non-resident defendants, who had no knowledge thereof until more than three years thereafter; that the individual interests of the heirs of Lash were not determined; that none of the non-resident defendants appeared in said action, and none of the minors had any knowledge of the action until more than two years after the decree had been rendered therein. The petition further states that said Jesse L. Williams died testate in the year 1886; that he devised all of his interest in said premises to plaintiffs Edward P., Meade C., and Henry M. Williams; that plaintiff Susan C. Williams was, long prior to July 26, 1883, the lawful wife of said Jesse, and so continued to be until the time of his death, and is entitled to one third of his interest in said premises; that plaintiff Henry M. Williams has purchased of said Edward J. Douthit, Jr., and of said Lucie D. Douthit, all their interest in said premises, and now owns the same; that defendants John Pierce and Daniel T. Hedges claim to be the owners of said premises under the partition proceedings, and that such proceedings are a cloud upon the title of plaintiffs. They demand that the decree and all orders in such proceedings be vacated; that the plaintiffs be declared the owners of the interests in said premises claimed in the petition; and that they have such other and further relief as may be equitable and proper.

The petition was filed on the twenty-fifth day of February, 1888. On the first day of the term, to wit, on the nineteenth day of March, 1888, the defendants appeared and filed a motion to strike from the petition the fifth, sixth, seventh, eighth, and a part of the tenth paragraphs, and to strike from the title the names of all the plaintiffs but Henry M. Williams. The portions of the petition which the motion sought to have stricken out were allegations to the effect that Jesse L. Williams was a resident of Indiana when the action for partition was commenced; that he was served with notice thereof only by publication; that he died testate; that plaintiffs acquired title from him as stated; averments in regard to the procuring of the order of partition; the appointment of referees; the

report of the referees; their alleged want of authority to sell; and averments of action of the court without jurisdiction. The motion was sustained on the twenty-third day of March, 1888. On the next day, the defendants filed their answer, in which they denied the allegations of the petition not otherwise answered; admitted the ownership of Jesse L. Williams, Wescott, and the heirs of Lash, on the fifteenth day of July, 1882, of the premises in controversy; that an action for the partition thereof was commenced by Wescott, as alleged; that all the defendants therein were at that time non-residents of Iowa; that a decree confirming the sale under the partition proceedings was rendered on the second day of January, 1883; admitted that defendant Hedges claims to own the premises under the partition proceedings, and denied knowledge or information sufficient to form a belief as to the alleged minority of any of the heirs of Lash; denied that Lucie D. Douthit was an heir of Lash; and denied knowledge or information as to whether Edward Douthit, Jr., had any interest in the real estate. Defendant Hedges also filed a counterclaim, in which he alleged himself to be the owner of the land in controversy, and set out the partition proceedings alleged in the petition. He alleged the sale of the premises to Pierce, as the highest and best bidder, for the sum of two thousand dollars; that the sale was confirmed, and a conveyance duly made to Pierce, who subsequently conveyed the premises to Hedges; that due notice of all the proceedings was given to all parties in interest; and that Edward J. Douthit, Jr., and Lucie D. Douthit have recognized the validity of said proceedings, and acquiesced in the same, and receipted for and released all their claim to the proceeds of said sale long before the pretended conveyance to plaintiff by them, of all of which plaintiff had full knowledge. The answer asks that the petition of plaintiff be dismissed; that defendants' title be quieted as against him; and for general equitable relief. On the twenty-sixth day of March, 1888, the defendants filed a motion for default against plaintiffs Susan C., Meade C., and Edward P. Williams, and on the same day defendant Hedges moved for default on his counterclaim against Henry M. Williams. At that time plaintiffs had not appeared to the motions nor answers, and, so far as the record showed, had done nothing in the cause after filing the petition. The motions were not resisted, and on the day they were filed were sustained, and a decree was rendered in favor of defendants, dismissing the petition of plaintiffs, and

quieting the title of defendants in the land in question. On the twelfth day of April, 1888, the plaintiffs filed motions to set aside the various orders aforesaid and the final decree. After a hearing on these motions they were overruled, and that ruling is presented to us for review.

1. The first question to be determined is, whether the plaintiffs sufficiently excused their failure to appear in court and make timely resistance to the orders and decree of which they now complain. The showing in excuse of the default is substantially as follows: The plaintiffs were represented by Messrs. Parsons and Perry, attorneys, of Des Moines. Mr. Parsons left home on the seventh day of March, 1888, and was continuously absent from the state until the fifth day of April. Before leaving, he requested Mr. Perry to write to the clerk of the court, requesting him to send to them copies of all papers filed in the case immediately upon their being filed, and to give immediate attention to all steps which should be taken by defendants or their attorneys during his absence. On the twenty-eighth day of February, 1888, Mr. Perry wrote to the clerk of the court at Sioux City as follows: "Will Mr. James Fullerton of your city be accepted as surety on cost bond? If so, we will send one up to him, and have him bring the same to you for approval. Will you kindly advise us of any papers filed in the case by defendants, and, if not too much trouble, send us copies of the same?" That letter was not answered, although it was received in due time. March 31, 1888, Parsons and Perry sent to the clerk the following telegram: "Send us immediately copy of all papers and decrees in *Williams v. Wescott*, except petition." At four o'clock in the afternoon of April 5th, Parsons and Perry first heard from the clerk, by means of a letter, in language as follows: "Excuse my delay in not replying sooner. My deputy is sick, and having only one, a good deal of work has fallen upon my shoulders. I inclose herewith motion, copy of answer and counterclaim, decree prepared by Mr. C. L. Wright, which I have just entered of record; also above entry, being ruling of court on motions to strike." The two letters and the telegram were the only communications which passed between the attorneys for the plaintiffs and the clerk relative to the pleadings and proceedings in the cause. The only rules of practice in force in Woodbury County at that time were those adopted by the convention of judges on the eighth day of January, 1887. One of these required that

"every party, at the time of filing any petition, answer, reply, demurrer, or motion, except a motion for continuance or change of venue, shall file with the same one plain copy thereof for the use of the adverse party." It may be conceded that the attorneys for the plaintiff had intended, in good faith, to do whatever was necessary to protect and promote the interests of their client in this case, and that their failure to make timely appearance to the various papers filed was due to their not having heard from the clerk. But it does not appear that the court, nor the attorney for defendants, had any knowledge of their correspondence with the clerk, nor of their intentions in regard to the case. Section 2635 of the code provides that "the defendant shall, in an action commenced in a court of record, demur, answer, or do both, as to the original petition, before noon of the second day of the term." Section 2636 provides that "each party shall demur, answer, or reply to all subsequent pleading, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed. But all pleadings must be filed by the time the cause is reached for trial." Section 2639 requires all motions assailing a pleading, except in certain cases, to be filed before an answer or reply has been filed. It appears, therefore, that plaintiffs were, in fact, given more time to appear and plead in this case than they could have claimed under the statute. Appellants insist that they had a right to rely upon the clerk for information as to the pleadings filed and proceedings had, but they have not called our attention to any statute or rule which imposes that burden upon him, and in this case the clerk did not assume it. Certainly it was not placed upon him by the rule quoted. A due regard for the dispatch of business requires of litigants a prompt attention to the preparation and prosecution of their causes. In this case the attorneys for plaintiff resided several hundred miles from the place where the court in which the cause was pending was being held. Prior to the rendition of the final decree they wrote one letter to the clerk, asking to be advised of papers filed, and to have copies sent, "if not too much trouble." This was written nearly three weeks before the term commenced, and was never answered. They knew that fact, but do not seem to have taken any other steps to inform themselves of the condition of the case, nor of the business of the court, until after the decree was rendered. They do not seem to have been misled by any

mistake of fact, as in the case of *County of Buena Vista v. I. F. etc. Ry Co.*, 49 Iowa, 657. The absence of counsel was not unavoidable. "The party and his attorney must take notice of the time and place of holding court, and of the position of the cause on the calendar, and be present when it is called for trial": 1 Hayne on New Trial and Appeal, p. 226, sec. 76 (2). It has been said that the fact that a party was misled as to the condition of the calendar, and hence did not have a material witness in attendance when the cause was reached for trial, furnishes no ground for a new trial: Hilliard on New Trials, p. 534, sec. 24. Applications of the kind under consideration must necessarily be governed in large part by the facts of the case, and should be determined in the exercise of a sound legal discretion.

2. The next matter for our consideration is the showing of merits on the part of plaintiffs. The affidavit of Mr. Parsons contains the only allegations of merit excepting the averments of the petition, and they are as follows: "Deponent further says that he believes he is fully acquainted with all the facts affecting plaintiffs' right to recover set out in the petition; that they are in every essential respect, except as to the allegations in the so-called counterclaim of the said Hedges as to who were made parties in said action for partition of said premises, and the allegation therein that said Edward J. Douthit, Jr., and Lucie D. Douthit recognized the validity of said partition proceedings, and the allegations that the court ordered a sale of said premises, and excepting the legal conclusions contained in said pleading, the same as set out in the said defense or counterclaim of said Hedges; and that plaintiffs have a good and substantial defense to said claim of said Hedges; and that the same would fully appear upon the trial of this action on plaintiffs' petition and the denials contained in defendants' answer. . . . Deponent further says he believes that plaintiffs have a perfect defense to the claims of said Hedges, and that great injustice would be done them unless said decree be vacated and plaintiffs be allowed an opportunity to try this case upon its merits." Mr. Perry states under oath that the value of the real estate in controversy, according to the best information he can obtain, exceeds the sum of twenty thousand dollars. Its value when the referee's sale was approved—something more than five years before—is not shown. The affidavits filed in support of the motions of plaintiffs do not add materially to the showing of merits made by the plead-

ings. From them we learn that three of the plaintiffs claim as devisees, and one as widow of Jesse L. Williams, deceased; that the aggregate interest thus claimed by them is the ownership of an undivided one half of the premises in controversy. In addition to the interest he claims to have derived as devisee, Henry M. Williams claims to be the owner of an undivided one four-hundred-and-fortieth of said premises as the grantee of Edward J. Douthit, Jr., and Lucie D. Douthit. The petition shows that Edward Douthit and Edward T. Douthit were heirs of Lash, deceased, but fails to show that Edward J. Douthit, Jr., was such heir. Conceding, for the purposes of this case, that he was a minor heir of said Lash when the partition proceedings were pending, we find Henry M. Williams's alleged interest to be as stated.

It seems to be the theory of plaintiff that if the circuit court did not acquire jurisdiction of all the persons interested in the real estate, the proceedings in partition were voidable, if not void; but that cannot be true of those who were actually or constructively in court, and who made no objection to the proceedings. If the persons who were not made parties are satisfied, those who were should not be heard to complain. The petition shows that service by publication was made upon all the non-resident parties defendant in the partition proceeding. Such service was expressly authorized by statute: Code, sec. 2618 (2). It was sufficient as to non-resident minors: *Judd v. Mosely*, 30 Iowa, 426. A guardian *ad litem* was appointed and filed answer for Edward Douthit. Therefore, as to his interests, the proceedings in partition had become final and conclusive in favor of defendants before this action was commenced.

The counterclaim alleges that both Lucie D. Douthit and Edward J. Douthit, Jr., acquiesced in the partition proceedings, and receipted for and retained all their claim to the proceeds of the sale long before their alleged conveyance to Henry M. Williams was made, and that he knew that fact. The counterclaim was not denied, excepting by a general averment of a perfect defense thereto, made by an attorney in support of the motions under consideration. We do not think it has been sufficiently met, but if it has, we have seen that the interest of Edward J. Douthit, Jr., was extinguished before this action was commenced; and the interest acquired from Lucie D. Douthit would be little more than nominal, if plaintiffs' estimate of the value of the premises in question be accepted,

to wit, an undivided one eight-hundred-and-eightieth of property valued at about twenty thousand dollars.

The petition shows that due service by publication was made on Jesse L. Williams, and that he lived more than two years after the referee's sale was made and the deed was executed. His interest in the premises was therefore terminated before his death, and his devisees acquired no title from him. But it is said that his wife was not made a party to the proceedings in partition, and therefore that she is entitled to recover an undivided one third of the interest he held at the time the decree in partition was rendered. Section 2440 of the code provides as follows: "One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee-simple, if she survive him." Her interest is therefore contingent, and is subject to divestment, even by a judicial sale to which she is not a party. A referee's sale in partition proceedings is of that character: *Weaver v. Gregg*, 6 Ohio St. 547; 67 Am. Dec. 355; see also Freeman on Cotenancy, sec. 474.

We conclude, on the showing of the plaintiffs, conceding to it all which may be reasonably claimed, that it shows no right of recovery, excepting in favor of Henry M. Williams for the interest alleged to have been acquired from Lucie D. Douthit, which at most is less than twenty-five dollars in value. But the claim of defendants in regard to that interest has not been properly met. In our opinion, the showing of diligence and merit made by plaintiffs is not sufficient to entitle them to the relief they demand.

3. Counsel discuss with much earnestness the ruling of the district court on the motion to strike from the petition, and the nature and effect of the counterclaim of Hedges. But, in view of the conclusion we have reached on other questions, no practical benefit would result from a further consideration of questions not determined. The rulings and decree of the district court are affirmed.

MORRONS TO SET ASIDE JUDGMENTS. — A defendant against whom a judgment was rendered by default, after notification by publication, and not personally, may seek relief therefrom within one year from notice of entry of judgment: *Lord v. Hawkins*, 39 Minn. 73; but before a judgment by default can be set aside in a case in which the court had acquired jurisdiction,

defendant must show by affidavit a meritorious defense to the claim of the plaintiff, and a reasonable excuse for having made default: *Joerns v. La Nicca*, 75 Iowa, 705; *Hall v. Durham*, 116 Ind. 198; *Green v. Stobo*, 118 Id. 332; *Rupert v. Martz*, 116 Id. 72; *Harris v. Musgrave*, 72 Tex. 18. So while reasonably accounting for the absence of one's attorney and himself at the trial of a motion, the party must also show a meritorious cause of action or defense by affidavits: *Holliday v. Holliday*, 72 Id. 581. A motion for setting aside a judgment and granting a new trial, upon the ground of surprise or accident, must show the exercise of ordinary diligence to ascertain the facts by which it is claimed the party was surprised or prevented from presenting his case: *Beachley v. McCormick*, 41 Kan. 485. Where a cause comes on for trial in its regular order, under the rules of the court, at a time when counsel, owing to a different rule in an adjoining circuit, does not expect it, and in consequence of which he fails to be present at the trial, this is no valid ground of a new trial, unless there is bad faith or fraud on the part of opponent's counsel: *Holloway v. Holloway*, 97 Mo. 628; 10 Am. St. Rep. 339; compare extended note to *Burnham v. Hays*, 58 Am. Dec. 392-398.

JUDGMENT IN PARTITION SUITS, THE EFFECT OF: See note to *Nicely v. Boyles*, 40 Am. Dec. 640-642. A valid decree in partition severs the unity of possession, and each tenant in common becomes entitled to the exclusive possession of that part of the premises which is allotted to him, and is concluded as to all rights in other parts, irrespective of adverse possession of such parts by those to whom they were allotted: *Richardson v. Loupe*, 80 Cal. 492. Where one is not named in a petition for partition, he cannot appear and answer after a trial upon the merits, unless he shows that he has some estate or interest in the realty in question: *Fales v. Fales*, 148 Mass. 42.

SUMMONS — SERVICE BY PUBLICATION. — An affidavit to the effect that defendant resides out of the state is sufficient to authorize service by publication: *Furnish v. Mullan*, 76 Cal. 646; *Bogle v. Gordon*, 39 Kan. 31; and in attachment cases it must also appear that defendant has property within the state which may be attached or garnished: *Searing v. Benton*, 41 Id. 758; *Bogle v. Gordon*, 39 Id. 31. To effect service by publication, under a statute requiring publication for four consecutive weeks, the citation must be published for full twenty-eight days, once in each week for four weeks: *Davis v. Robinson*, 70 Tex. 395. For an instance of an affidavit alleging facts sufficient to authorize an order for publication in a collateral proceeding: *Pike v. Kennedy*, 15 Or. 420. Publication of notices in the supplement of a paper is a good and valid publication: *Supervisors v. Horton*, 75 Iowa, 271. A notice of publication is not invalid merely because it requires defendant to answer by noon of the day when the law requires the answer to be filed, nor is he thereby deprived of his privilege of answering in the afternoon of such day: *Armstrong v. Middlestadt*, 22 Nev. 711. Service by publication may be had in justice of the peace courts under the same rules and restrictions which apply to district courts: *Davis v. Robinson*, 70 Tex. 394. Choses in action are property within the meaning of statutes providing for service by publication in cases where defendant is not a resident of the state, but has "property" therein: *Winfree v. Bagley*, 102 N. U. 515; compare *Mudge v. Steinhart*, 78 Cal. 34; 12 Am. St. Rep. 17, and note; *Godfrey v. Valentine*, 39 Minn. 236; 12 Am. St. Rep. 657, and note.

ÆTNA LIFE INSURANCE COMPANY v. HESSER.

[77 IOWA, 381.]

CLERK AS CUSTODIAN OF RECORDS OF JUDGMENTS HAS NO AUTHORITY TO TAMPER WITH THEM by adding a letter to the name of a judgment debtor in the index, and if he does so, the alteration is to be disregarded, and the record is to be regarded as it stood before it was tampered with. **NAME "HESSER" AND "HESSE" ARE SO DISSIMILAR** that one searching for encumbrances against the former would not be charged with notice of a judgment against the latter, nor put upon inquiry.

EVERY ONE IS AUTHORIZED TO RELY ON FULLNESS AND CORRECTNESS OF INDEX of all liens in the district court, which the clerk is by law required to keep in a book as a record of his office.

"INDEX OF ALL LIENS" SHOWS ALL JUDGMENTS IN THE COURT to which the records pertain. And if such liens may be found by consulting other indexes, the searcher is not required to resort to such other indexes after having examined the "index of all liens," for he is authorized to rely upon its fullness and accuracy.

PURCHASER WITHOUT ACTUAL NOTICE IS NOT BOUND BY JUDGMENT NOT INDEXED, because the record required by the statute to impart constructive notice does not exist if the index required by statute be wanting.

ENTRY IN INDEX IS NECESSARY TO MAKE JUDGMENT OR TRANSCRIPT A LIEN. — A judgment or transcript, before it becomes a lien, must be of record in the books required by statute, and the record is not completed until an entry is made in the index.

JUDGMENT IS NOT REGARDED AS RENDERED UNTIL IT HAS BEEN INDEXED, nor is the filing of a transcript of a judgment completed so as to make the judgment a lien until it is indexed.

JUDGMENT NOT ENTERED IN "INDEX OF ALL LIENS" IS NOT A LIEN superior to that of the mortgage of a subsequent mortgagee without actual notice.

ACTION to foreclose a mortgage. The decree declared the title to the land to be in one of the defendants, under a purchase at a sale under a judgment which was held to be a lien upon the land prior to plaintiff's mortgage, and that the defendant held the land free from the lien of the plaintiff's mortgage. The plaintiff appealed. Other facts are stated in the opinion.

Albert E. Clarke, for the appellant.

Wright and Farrell, and Baker and Ball, for the appellees.

BECK, J. 1. The facts upon which the decisive questions in this case arise are these: The mortgage which plaintiff seeks to foreclose was executed by J. H. Hesser, and conveys certain lands in Webster County. Before the execution of the mortgage a judgment had been rendered against Hesser, and in favor of one Coost, and another by a justice of the peace of

Louisa County, a transcript of which had been filed in the office of the clerk of the district court of Webster County, before plaintiff's mortgage was executed and filed for record. Plaintiff insists that its mortgage is the paramount lien, for the reason that defendants' judgment was not shown by the "index of all liens" required to be kept by the clerk of the district court in his office.

2. The decisive question in the case is this: Is plaintiff's mortgage lien superior to the lien of defendants' judgment, on the ground of the absence of an entry thereof upon the index required to be kept by law? The facts upon which this question is to be determined are as follows: Defendants' judgment, it may be assumed, was duly rendered, and a transcript thereof was filed in the clerk's office in Webster County. Plaintiff, however, insists that the judgment was rendered against "J. H. Hesse." We waive inquiry on this point, as it need not be determined, in view of the conclusion we reach on another branch of the case. It is also insisted that the judgment, after being filed in Webster County, was not, before plaintiff's mortgage was executed, entered upon the "index of all liens," required to be kept by Code, section 197, subdivision 8. This position is disputed by defendants. We find the facts to be that the entry upon this index intended to indicate the judgment gives the name of defendant as J. H. Hesse.

The evidence upon this disputed point is as follows: The plaintiff caused an abstract of the title of the land to be made before the mortgage, which was for money loaned, was accepted. The examiner found no lien against Hesser. An agent of plaintiff, to verify the examiner's work, examined the index of the liens, and found nothing against Hesser. They both testify that their examinations were carefully made. The first examiner testifies that, some time after, in his presence, the clerk's attention being called to the entry on the index, he changed the name by adding an *r* to the name "Hesse." This evidence is positive, plain, and direct. It is sought to be discredited by proof that a person who the witness declares called the attention of the clerk to the name, and saw the change made, was not present. The witness afterwards states that he was not acquainted with the person referred to, and that he might have given the name which was repeated by the witness, or might have stated that he was the agent or representative of a person of that name. But the witness is corroborated

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by the agent of the plaintiff we cannot say that when the matter was changed by the addition of the name "Hesse" had no effect on the changed by the addition of the name "Hesse" corroborated plaintiff's witness it follows: "I recollect at that time, and in looking at the matter, my attention was called to the fact that the question arose as to whether or not the plaintiff's recollection is that the change was made by making it longer, but I cannot now recall the name of the Williams who was present at the time the change was made. Williams referred to in the witness testimony and the witness testified that he states was present when the change was made. The disagreement between the clerk says that the change was made by "lengthening the name" and the plaintiff by "lengthening the name" admits that there was a change. It stood that it was only a change in the name, on his own admission, the change was made in the curve, which, to say the least, was an uncertainty even to him was an uncertainty. No custodian of records is to be regarded as it stood before us. We find it unnecessary to go to the evidence to consider certain photographs of the index reach the conclusion that the index is as the facts stated by us are concerned as to regard the index as showing a judgment Hesse, and not J. H. Hesser.

3. It is plain that the name searching for evidence.

3. It is plain that the names are searching for encumbrances would not of the judgment, or put on inquiry: Iowa, 58; *Howe v. Thayer*, 49 Id. 154.

4. Code, section 197, provides that court shall keep

4. Code, section 197, provides that the clerk of the court shall keep, as a record of his office, "a book or index of all liens in the district court shall be kept as the statute requires indexes of record-books."

and of some other records to be kept. These records and the indexes are all to be kept for use, to the end that the proceedings of the court and encumbrances upon property may be readily discovered. It is obvious that the law requires all of them to be correctly kept, and any one consulting the proper index is authorized to rely upon its fullness and correctness.

5. It is plain that the "index of all liens" shows all judgments in the court to which the records pertain. If such liens may be found by consulting other indexes, the searcher is not required to resort thereto after having examined the "index of all liens"; for he is authorized to rely upon its fullness and accuracy. The plaintiff, therefore, after having caused this index to be examined, was not required to pursue inquiry through other indexes.

6. We are required to inquire whether a judgment or transcript of a judgment, found in the records of the clerk's office, is a lien, and operates as notice thereof, if the index required by statute be wanting. It is the settled policy of the law to require notice to be given to all the world of the title to and encumbrances upon real estate, to the end that an innocent purchaser, having no notice of liens or adverse claims not disclosed by the records in the manner prescribed by the statute, will hold land as against such claims and liens. Judgments and liens, in order to bind land as against persons having no actual notice thereof, must appear of record in the manner prescribed by the law; that is, they must be found in the records wherein the statute requires them to be entered. It is plain that a judgment, though formally entered and signed upon a paper duly filed and attached to the court files, would not operate as a lien, for the reason that it is not found in the books provided by law as the receptacle of the records of judgments. The statute requires indexes to be kept, and judgments and liens to be duly entered therein: Code, sec. 197. A transcript of a judgment filed in the clerk's office by special provisions is required to be indexed: Id. 2885. The statute requires an index to be kept, and to be used by entering therein all liens. A judgment transcript or other lien is not completed as an encumbrance until it be indexed. The purpose of the index is to give notice of the encumbrance, just as the registry of a deed is intended to give notice of the conveyance. Now, it is plain that, in order to establish a lien as against an innocent purchaser having no notice thereof, the index, being the very instrument intended to impart notice, is

to be regarded a part of the very record of the judgment; that is, the entry of the judgment in the book provided therefor, and the index required to be kept by the statute, constitute the record of the judgment as regarded when questions as to liens arise which affect purchasers without actual notice. Therefore, when a judgment is not indexed, a purchaser without actual notice is not bound thereby, for the reason that the record required by the statute to impart constructive notice, i. e., the indexed judgment, does not exist. In support of these views, see *Thomas v. Desney*, 57 Iowa, 58; *Sterling Mfg. Co. v. Early*, 69 Id. 94; *Cummings v. Long*, 16 Id. 41; 85 Am. Dec. 502; *Hove v. Thayer*, 49 Iowa, 154.

7. Counsel for defendants insist that, as the statute declares that a judgment and a transcript shall be a lien from the day of the rendition of the one and the filing of the other, the lien is to be enforced without regard to the absence of the index required by law. They rely upon the following sections of the code:—

“Sec. 2883. When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition.

“Sec. 2884. If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies.

“Sec. 2885. Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same, in the same manner as though rendered in the court of his own county.”

The last section quoted requires the transcript to be indexed. Other provisions, referred to above, require judgments to be indexed. These provisions and the sections just quoted are to be considered together in the light of the views we have above stated. The judgment or transcript before it becomes a lien must be of record, i. e., entered in the record-books required by statute. When that is done, it becomes a lien; before, it was not, for the record was not completed by an entry in the index, which is required to make it a lien. This view harmonizes the provisions of the sections just quoted and other provisions hereinbefore referred to.

8. But we think a fair construction of the language of sections 2883 to 2885 does not authorize the conclusion that the lien begins upon the entry of a judgment or the filing of a

transcript. Section 2883 declares that a judgment is a lien upon lands in the county wherein it is rendered, "from the date of such rendition." "Rendition" is the act of rendering. To "render" is "to make up, to finish, to state, to deliver; . . . as, to render a judgment": Webster's Dictionary. Now, a judgment is not rendered, so as to be effective and capable of enforcement as a lien, until it is "made up, finished, stated, or delivered" in the form and manner as required by statute. It must be entered of record in the books prescribed by statute. One of these books is the "index of all liens." Therefore, "the date of rendition" of the judgment which shall operate as a lien is when it is completely rendered, i. e., entered on the record-books prescribed therefor, among which is the "index of all liens." So the filing of a transcript of a judgment contemplated by section 2885 is not completed so as to make the judgment a lien until it be indexed. The judgment will not be regarded as rendered until it has been indexed.

9. We reach the conclusion that as the judgment set up by defendant was not entered in the "index of all liens," it is not a lien superior to plaintiff's mortgage. The decree of the district court will be reversed, and a decree foreclosing plaintiff's mortgage, in conformity with the views above expressed, will be entered in this court, or, at plaintiff's option, the cause will be remanded for such a decree in the court below.

Reversed.

NOTICE. — AS TO WHAT NOTICE is imparted by the records of conveyances: Note to *Hockenhull v. Oliver*, 12 Am. St. Rep. 238. In Louisiana, a party has no notice of judicial proceedings with respect to real estate when he was not a party thereto, unless he may acquire constructive notice from a valid registry of the transfer, which grows out of the proceedings: *Boyer v. Joffrion*, 40 La. Ann. 657; compare *Cole v. Green*, 77 Iowa, 307; *ante*, p. 283, and note.

RECORDING OF WRITTEN INSTRUMENTS, ETC. — MISCELLANEOUS PRINCIPLES. — As to the registration of foreign probate proceedings: *Stayton v. Singleton*, 72 Tex. 210. A title bond is not subject to registry, and when recorded does not operate to impart constructive notice: *Vallandigham v. Johnson*, 85 Ky. 288. A chattel mortgage must be recorded, not only in the county where the mortgagor resides, but also in the county where the property is; and if the property is removed into another county, the mortgage must be recorded in that county within six months: *Pollak v. Davidson*, 87 Ala. 551. The registration, July 17, 1868, in another county, of a judgment upon which execution had not issued within twelve months after its rendition, did not operate as a lien in the county where it was recorded: *Clements v. Ewing*, 71 Tex. 370. Ordinary instruments, entitled to be recorded, are deemed recorded from the date of their being filed for record; but in Texas this rule

does not apply to the registry of abstracts of judgments, which are never regarded as recorded until actually recorded: *Belbaze v. Ratto*, 69 Id. 636. The recording of an unacknowledged mortgage assignment will not impart constructive notice, although made upon the back of a mortgage which has been duly acknowledged and recorded: *Cowles v. Fisher*, 41 Kan. 419. The change of county boundaries does not impose the duty of re-recording conveyances of such lands as are under the new boundaries thrown into different counties from the one of which they originally formed a part: *Koerper v. St. Paul etc. Ry Co.*, 40 Minn. 133. The effect of registry statutes is to give priority of lien to a recorded mortgage to secure a pre-existing debt over an unrecorded mortgage to secure purchase-money for machinery furnished in the building of a mill, where the mortgagee of the recorded mortgage had no actual notice of the unrecorded mortgage: *Hayner v. Eberhardt*, 37 Kan. 308; for the lien of an unrecorded instrument is not good against a purchaser without notice: *Newcom v. Kurtz*, 86 Ky. 277; *Troy v. Walter*, 87 Ala. 233. So where the title to realty appears of record in a testator at his death, and lands given by him in his will to a devisee are conveyed to a *bona fide* purchaser for value, and such conveyance is duly recorded, the title of such purchaser is preferred to that of a grantee of the same lands from the testator before his death, but whose deed was not recorded at all, or recorded subsequently to that of the grantee of the testator's devisee: *Lyon v. Gleason*, 40 Minn. 434. A mortgagee, to protect himself by examining the records, where no one is in possession of the mortgaged premises, need only search for records of conveyances given by the mortgagor and those under whom he claimed, and he cannot be affected by any adverse claims not appearing from such instruments: *Stead v. Grosfeld*, 67 Mich. 289. As to presumptions indulged in with respect to the time of making entries upon the indexes, and of recording instruments entitled to record: *Lane v. Duchac*, 73 Wis. 646. The registry of an instrument is not invalidated by a mere clerical error which affects in no way the sense or meaning: *St. Croix etc. Co. v. Ritchie*, 73 Id. 409. The record of an executory contract for the sale of lands is constructive notice to subsequent purchasers, but it does not entitle the contractee to a preference over the grantee in a deed given before the execution of such contract: *Thorsen v. Perkins*, 39 Minn. 420.

BONA FIDE PURCHASERS WITHOUT NOTICE. — A purchaser from one who is not in possession, and who has no title, is not entitled to protection against secret equities as a *bona fide* purchaser; nor is a grantee in a quitclaim deed a *bona fide* purchaser without notice: *O'Neil v. Seixas*, 85 Ala. 80; but where there is no record of the title bond, nor actual possession of the land sold, nor evidence of notice by a purchaser of land sold, such purchaser would hold against the elder unrecorded title bond: *Wright v. Lassiter*, 71 Tex. 640. The probate of a will in Tennessee will not affect a *bona fide* purchaser of land in Texas from an heir before the will was probated in Texas: *Slayton v. Singleton*, 72 Id. 210.

WILSON v. DUNREATH RED-STONE QUARRY CO.

[77 IOWA, 429.]

MASTER IS NOT LIABLE FOR DAMAGES SUSTAINED BY EMPLOYEE FROM NEGLIGENCE OF CO-EMPLOYEE, notwithstanding the latter was higher in authority than the one who received the injury.

MASTER IS NOT LIABLE FOR ACT OF EMPLOYEE IN DIRECTING USE OF UNSAFE MACHINERY, where it is not shown that the latter had authority to direct what machinery or appliance should be used.

DECLARATIONS OF FELLOW-SERVANT, NOT PART OF RES GESTÆ, INADMISSIBLE. — Declarations or admissions of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence against the principal or master.

EVIDENCE OF CONTRIBUTORY NEGLIGENCE, WHAT ADMISSIBLE. — Where an action is brought by an employee to recover damages for an injury sustained by him in riding down a trainway in a car, evidence that the plaintiff had been warned of the danger of getting on the car, and that he knew it was a perilous ride, is admissible, as bearing upon the question of contributory negligence.

ACTION for personal injuries. The defendant was a corporation engaged in quarrying and shipping stone from its quarry. In December, 1886, the plaintiff was employed by the defendant as a laborer. The defendant undertook to construct a double tramway down an incline, on which to run cars to carry off refuse. Before the work of constructing the tramway was completed, one Stuart, who was superintendent of the quarry, went away temporarily. During his absence the men at work in the quarries rigged up a tackle and snatch-block fastened to a tree to let down loaded cars. They attempted to let down two loaded cars by these means. Just before the attempt was made, one Horner, who was at the bottom of the incline, called up to plaintiff, who was near the top, to go to the top of the hill and get a scraper. The plaintiff claimed that Horner directed him "to go on top of the hill and get the scraper, put it on the car, and come down." But other witnesses testified that Horner told plaintiff to throw the scraper down over the bluff. Plaintiff got the scraper, put it on the car, and got on the car himself, and began to make the descent. As soon as the weight of the cars came upon the tackle, the pin in the snatch-block broke, the cars descended at a great rate of speed, jumped the track, and the plaintiff was severely injured. Other facts appear from the opinion.

C. H. Robinson, Stone and Gamble, and Kaufman and Guernsey, for the appellant.

Hays Brothers, for the appellee.

ROTHROCK, J. 1. It is conceded that the accident happened by reason of the breaking of the pin in the snatch-block, and that the pin was defective in that it was so much worn as to be insufficient to withstand the weight of the descending cars. One of the main points in controversy is, whether the snatch-block and rigging were put in position under the orders of any one who stood in the relation of vice-principal to the defendant. The plaintiff claims that Horner, the man who directed the scraper to be brought or thrown down, stood in the place of the company, and that he directed the construction of the appliance which caused the injury. On the other hand, the defendant insists that Horner was a mere laborer, and engaged in the same general service with the plaintiff. There is no dispute that Stuart was the superintendent of the quarries, and that one Washer was the foreman under Stuart. But Horner was an employee, who worked wherever he was directed. He had charge of the tools, and kept the time of the men. It is true that at times he may have given direction to some of the employees in regard to the work at which they were engaged. But there is no evidence that he had any authority at any time to direct the construction of machinery, or to purchase tools, or make selection of appliances to be used to facilitate the work. In such case, even if it be conceded that he was foreman of the gang of laborers, in the absence of Stuart and Washer, he was nevertheless a fellow-servant, and his principal is not liable for damages sustained by an employee from the negligence of a co-employee, notwithstanding he was higher in authority than the one receiving the injury: *Sullivan v. Mississippi etc. R'y Co.*, 11 Iowa, 421; *Peterson v. Whitebreast etc. Mining Co.*, 50 Id. 673; 32 Am. Rep. 143; *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576; *Foley v. Chicago etc. R'y Co.*, 64 Id. 644. And see Wood on Master and Servant, sec. 425.

As we have said, it is not claimed that the defective snatch-block was put in position for use by the direction of the superintendent, nor by Washer. It is claimed, however, that, as both were absent, Horner acted in the place of the superintendent, or in other words, acted as and for the defendant, and that the snatch-block was used by his direction. And the jury, all through the instructions given to them by the court, were charged upon the theory that there was evidence from which such a finding could be made. We do not think these instructions were proper, under the evidence, in view of

the repeated decisions of this court as to the law applicable to cases of this character. The seventeenth paragraph of the charge to the jury is as follows: "It was the duty of the defendant to exercise reasonable care and prudence to protect the men who were employed by and working for it from injury; and if an injury to one of their employees resulted from the carelessness of the defendant's superintendent, or their servant, having control, direction, and management of its business, machinery, and appliances, then the company is liable, unless the person so injured has contributed to said injury by his own negligence." It is enough to say of this instruction that it is erroneous, because there is no evidence that Horner had authority to direct what machinery or appliances should be used. He neither had the authority of selecting, nor the power to put machinery in place. And we may say further, that there is no sufficient evidence that Horner had any agency whatever, in fact, in putting the defective snatch-block in use

2. Certain witnesses were allowed to testify to declarations and statements made by Horner relating to the snatch-block and its use. These statements were made before and after the accident, and were in no sense a part of the *res gestæ*. This evidence was objected to by defendant, and the objections were overruled. The evidence was improper. The declarations or admissions of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence: *Lucas v. Barrett*, 1 G. Greene, 510; *Verry v. B. C. R. etc. R'y Co.*, 47 Iowa, 549; *Treadway v. S. C. etc. R'y Co.*, 40 Id. 526; *Hakes v. Myrick*, 69 Id. 189. There are many objections made to the several parts of the charge given by the court to the jury, which we do not deem it necessary to determine. As we have said, all of the instructions are based upon the idea that there was evidence from which the jury might find that Horner was a vice-principal, and represented the company as such. We think there is no such evidence, and the instructions were therefore erroneous.

3. Much of the argument of counsel for appellant is to the effect that the court erred in not sustaining a motion in arrest of judgment based upon a variance between the averments of the petition and the evidence introduced upon the trial. We need not determine this question. An amendment to the petition was filed, by which it is claimed the alleged defect was cured. There is a dispute between the parties whether the

amendment was filed within the time and with leave of the court. We need not determine this question. It will not arise upon a new trial.

4. In view of a new trial, it is proper that we should briefly notice one other alleged error. It is a disputed fact in the case whether the plaintiff was directed by any one to ride down the tramway on one of the cars, and whether he was warned by the by-standers that the ride would be dangerous. In the cross-examination of the plaintiff as a witness, the following questions were propounded to him by the defendant's counsel: "I will ask you if you were not warned by more than one of your co-employees that it was dangerous to ride down on that car?" and "I will ask you if you did not, when you got into that car, know or have reason to know that it was a dangerous trip to make,—a dangerous ride?" Objections to these questions were sustained. The objections should have been overruled. If the plaintiff was warned of the danger, and knew that it was a perilous ride, these facts would have been an important consideration, as bearing upon the question of contributory negligence. We refer to this, because more than one witness testified that the plaintiff was warned not to ride down on the car, and one of these witnesses stated that the plaintiff "said he was going to ride down or break his damned neck."

For the errors above pointed out, the judgment will be reversed.

MASTER AND SERVANT—WHO ARE FELLOW-SERVANTS: *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263; *Peterson v. Chicago etc. Ry Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and cases collected in note. A track-walker on a railroad is not a fellow-servant with a locomotive-engineer or fireman of a passenger train: *Sullivan v. Missouri P. Ry Co.*, 97 Mo. 113; compare *Kentucky Central Ry Co. v. Ackley*, 87 Ky. 278; 12 Am. St. Rep. 480, and note.

MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO SERVANT FROM FELLOW-SERVANT'S NEGLIGENCE.—The general rule is, with a few well-defined exceptions, that a master is not liable for injuries to his servant occasioned through the negligence of fellow-servants engaged in the same common employment: *Peterson v. Chicago etc. Ry Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and particularly note 570, with the cases there collected; because the servant always assumes all such risks as he knows, or which ordinary care and reasonable diligence will teach him to know: *Yates v. McCullough*, 69 Md. 370; *Anderson v. Minnesota etc. R. R. Co.*, 39 Minn. 523; *Woods v. St. Paul etc. R. R. Co.*, 39 Id. 435; and among the risks so assumed by a servant are any dangers which may originate from the negligence of his fellow-servants: *Hewitt v. Flint etc. R. R. Co.*, 67 Mich. 61; *International etc. R. R. Co. v. Tarrar*, 72 Tex. 306; and so a servant is also presumed by law to assume

a capacity for the employment he undertakes, and the ability requisite for its performance: *International etc. R. R. Co. v. Hester*, 72 Tex. 40.

EVIDENCE — WHAT IS ADMISSIBLE AS RES GESTÆ: See *Eric etc. R. R. Co. v. Smith*, 125 Pa. St. 259; 11 Am. St. Rep. 895, and cases cited in note. Affidavits inclosed in letters written by plaintiff to defendant concerning the sale, and referred to in defendant's testimony, are admissible in evidence as a part of the *res gestæ* in actions arising out of such sale: *Moses v. Katzenberger*, 84 Ala. 95. In a suit to recover realty, the question arising, whether defendant had held by adverse possession long enough to acquire title thereby, that one under whom defendant claimed had ousted a third party, and the accompanying statements that the land belonged to him, may be admitted as *res gestæ*, explanatory of the character and extent of defendant's possession: *Bunch v. Bridgers*, 101 N. C. 58.

RICHMAN v. SUPERVISORS OF MUSCATINE COUNTY.

[77 IOWA, 512.]

CURATIVE ACT, WHAT DEFECTS IN PROCEEDINGS OF BOARD OF SUPERVISORS MAY BE CURED BY. — If the proceedings of a board of supervisors of a county be void for want of jurisdiction, and if the thing wanting in such proceedings, or which failed to be done, is something which the legislature might have dispensed with by a prior statute, it is within the power of the legislature to dispense with it by subsequent statute. Where, therefore, a county board of supervisors proceed to construct a levee, and to assess the cost thereof against certain lands supposed to be benefited thereby, but its proceedings are adjudged to be void for want of jurisdiction, solely because "a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting-point, route, and *termini*," an act of the legislature subsequently enacted to validate such proceedings will not be unconstitutional, since the jurisdictional act was one with which the legislature could have dispensed in the first instance.

CURATIVE ACT WHICH PROVIDES OPPORTUNITY FOR HEARING UPON NOTICE before a burden by way of assessment shall attach to property supposed to be benefited by a public improvement is not obnoxious to the constitutional objection that it is an attempt to take private property without just compensation.

LOCAL AND SPECIAL LEGISLATION, WHEN PERMISSIBLE. — An act, though both local and special in its application, where the accomplishment of its principal object would be very difficult, if not impossible, may not be so obnoxious to a constitutional requirement that the legislature shall not pass local or special laws where the general law can be made applicable as to justify an interference by the courts. And where such is the case, the act will not be declared unconstitutional.

TITLE OF ACT NOT OBNOXIOUS TO CONSTITUTIONAL PROVISION WHEN. —

An act entitled "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine Island, in said counties, and to provide for an assessment of the costs thereof on the lands benefited thereby," is

not repugnant to a constitutional provision requiring that "every act shall embrace but one subject, and matters properly connected therewith."

CONTRARY RULINGS — WHICH CONTROLS. — Where a demurrer to a petition for a writ of *certiorari* is overruled, and the defendant makes a return, and, on a trial of the issues made thereby, questions legitimately arise involved in the issues presented by the demurrer, and after the determination of the demurrer there is a change in the personnel of the court, it is the duty of the court, as then constituted, to pass upon such issues; and if, in such case, the court holds at variance with the ruling on the demurrer, the last ruling must control.

FORMER ADJUDICATION NO BAR TO PROCEEDINGS UNDER CURATIVE ACT WHEN. — An adjudication declaring void, for want of jurisdiction, an assessment and levy of a special tax by a board of supervisors is no bar to a subsequent proceeding to assess and levy a tax for the same purpose, under an act of the legislature referring to such adjudication, and intended to validate the prior proceedings of the board in ordering the work for which the tax was designed to pay.

CERTIORARI. The opinion states the case.

Richman and Burke, for the appellants.

Jayne and Hoffman, Newman and Blake, and H. J. Lauder, for the appellees.

GRANGER, J. In 1882 proceedings were instituted by the boards of supervisors of Muscatine and Louisa counties for the construction of a levee on Muscatine Island, from a point near the city of Muscatine, in Muscatine County, to Port Louisa, in Louisa County, a distance of nearly twelve miles. The levee was constructed, and the costs thereof assessed against certain lands supposed to be benefited by the improvement, among the owners of which are the plaintiffs, some sixty in number. In a proceeding similar to this, the action of the defendant board was set aside, and its proceedings adjudged void by this court for want of jurisdiction: See *Richman v. Board of Sup. of Muscatine Co.*, 70 Iowa, 627. The twenty-first general assembly, with a view to cure the defects in the proceedings of the board, and enable it to assess the costs of construction and maintenance of the levee against the lands benefited, enacted what is spoken of in this case as a "curative act," the material portions of which are as follows: —

"Whereas, the proceedings of the boards of supervisors of the counties of Muscatine and Louisa, in the years 1882 and 1883, in respect to the location and construction of a levee on Muscatine Island, in said counties, along or near the west bank of the Mississippi River, from the city of Muscatine to Port Louisa, and in assessing the cost thereof on the land bene-

fited thereby, and claimed to have been invalid because said proceedings do not show upon their face that said levee was petitioned for by a majority of the owners of land adjacent thereto, and because, as it is claimed, such majority did not in fact petition therefor, and because of an alleged partial deviation in locating and constructing said levee from the route petitioned for, and because of other alleged irregularities and informalities; and whereas, on a writ of *certiorari* issued out of the circuit court of Muscatine County on the petition of sundry owners of lands in said county assessed for the costs of said levee, the assessment of the lands of said petitioners have been by the judgment of said court adjudged invalid, and set aside; and whereas, the said levee was constructed under and in pursuance of the said order and proceedings of said boards, and under contract entered into under the same and on the faith thereof,—be it enacted by the general assembly of the state of Iowa:—

“‘Section 1. That proceedings of the boards of supervisors of the counties of Muscatine and Louisa, in the years 1882 and 1883, in respect to the location and construction of a levee on Muscatine Island in said counties, from the city of Muscatine to Port Louisa, along or near the west shore of the Mississippi River, including the orders of the boards of supervisors for the location and construction of said levee, the letting and making of contracts therefor, the order for issuing warrants for payment for the work done in said construction, and the warrants issued thereunder, be and the same are hereby legalized, and shall be held and decreed valid and effectual to the same extent and effect in all respects as to said proceedings, as if the same had fully conformed to the law when the same were had and taken; and said levee, as actually constructed, shall be held and deemed to be a lawful levee, to be maintained and repaired as provided by law in respect to such public improvements; and all provisions of the law applicable to levees duly constructed under chapter 2, title 10, of the code, and the amendments thereto, shall apply to the said levee.

“‘Sec. 2. The boards of supervisors of Muscatine and Louisa counties, respectively, shall, at their regular meetings next after the expiration of thirty days from the taking effect of this act, proceed to ascertain anew the total amount of the cost and expense of the construction of said levee, including interest accrued and to accrue on the excess of the amount of

any unpaid warrants issued for payments due to contractors, over and above the amount of money applicable to such payments, now in the hands of the treasurers of Muscatine and Louisa counties, and including all costs and expenses of the proceedings in locating and constructing said levee (exclusive of any costs or expenses of litigation in reference thereto), and any amount necessary to compensate for property appropriated for said levee, and said boards shall reapportion and reassess the amount so ascertained among and upon the lands in said counties benefited by location and construction of the said levee in proportion to the amount of benefit to said lands, respectively. Said boards shall take as the basis for such reapportionment and reassessment the lists or schedules of lands in their respective counties heretofore assessed by them for said levee, as benefited thereby. But all persons interested in or affected by said assessments shall have the right to appear and be heard before said boards in respect to said apportionments and assessments, and the said boards shall, on such hearings, make such changes, both in respect to the lands to be assessed and the amounts to be assessed thereon, respectively, as in their judgment may be necessary, to make such apportionments and assessments just and equitable, and on the completion of said reapportionments and reassessments, all the provisions of the law applicable to apportionments and assessments made under and by virtue of chapter 2, title 10, of the code, and the amendments thereof in respect to the mode of collection and application of the proceeds thereof, and appeals therefrom, including the provisions of sections 6 and 7 of chapter 85 of the acts of the eighteenth general assembly, shall apply to the said reassessments hereby directed; provided, that the owners of any lands so assessed shall be entitled to credit upon their said reassessments for any payments made and not refunded upon any previous assessments made or assumed to be made upon such lands, respectively, for or on account of the construction of the said levee.

“‘Sec. 3. This act, being deemed of immediate importance, shall take effect from and after its publication in the Muscatine Journal and the Wapello Republican, newspapers published in Muscatine and Louisa counties, and in the Iowa State Register, a newspaper published at Des Moines, Iowa, such publications to be without expense to the state.’”

Under the authority of these provisions of the law, the defendant board proceeded to reapportion and reassess the costs

of such improvements, taking as a basis the lands which in the prior proceedings had been reported as benefited by such improvement or construction. The proceedings resulted in the lands of the plaintiffs being assessed with amounts varying in proportion to the adjudged benefits thereto. The district court sustained the action of the board, and the record presents a number of interesting and important questions as to the legality of the proceedings of the board on constitutional and other grounds.

1. To a proper understanding of the contentions of counsel, it is important to have in mind that in the proceeding prior to the former adjudication between these parties in this court, the lands claimed to be benefited by the improvement had been selected under the provisions of the law prior to the curative act in question, lists or schedules thereof had been prepared, and the levee had been located and constructed. At this point in the proceeding, the action of the board of Muscatine County (defendant herein) was by this court declared void for want of jurisdiction, because of a failure to file in the office of the county auditor "a petition signed by a majority of persons, resident in the county, owning lands adjacent to such improvements, setting forth the necessity for the same, and the starting-point, route, and *termini*." It should also be kept in mind that the curative act, in providing for a reapportionment and a reassessment of the costs of the construction and future maintenance, provides that the board shall take as the basis of its action the lists or schedules of land heretofore assessed by them for said levee, and it further attempts to make valid the act of the board in the location and construction of the levee. In other words, the legislature undertook to make valid such acts of the board as this court had adjudged to be void. The position of appellants is succinctly and clearly stated, and we quote it as introductory to the further discussion of the question: "We wish our position to be understood in this matter, and we now explicitly state that all irregularities and informalities in the proceedings of boards of supervisors, where they have obtained jurisdiction of the subject-matter of such proceedings and of the proper persons, may be cured by an act of the general assembly. But where there is a want of such jurisdiction, and their acts are for that reason void, no curative act can ever reach them." It cannot be questioned that in this case the legislature has run counter to the proposition thus stated by counsel, and its correctness

as a proposition of law is to be determined. A concession by counsel, further on in the argument, enables us to come at once to the point in question: "We know it is contended, and will be, and we concede it to be the law, that if the thing wanting in such proceedings, or which failed to be done, is something the legislature might have dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute." Accepting this as the law (and its correctness could not, on authority, be questioned), we look to the former decision of this court to see for what reason the prior acts of the board were declared void. It is there at once seen that the failure of jurisdiction was entirely dependent upon the fact that "a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting-point, route, and *termini*." This is the only ground upon which the court denied the jurisdiction of the board, and it is fair to state that, with such a petition, properly filed, jurisdiction would have obtained.

The query then is, Could the legislature have dispensed with that requisite to the jurisdiction of the board in the first instance?—that is, would it have been competent for the legislature, in the enactment of the law under which the board first proceeded, to have provided that without such petition the board might determine the necessity for the improvement, its route and *termini*, and cause lists and schedules of the lands to be benefited thereby to be prepared, and thereafter, upon a prescribed notice to owners of the lands, with opportunities for a hearing before the assessment, and with the right of appeal, could the board take such action as would be binding upon the land-owners? We are not without adjudicated cases in this state involving facts so similar as to make them controlling. The case of *Boardman v. Beckwith*, 18 Iowa, 292, is one. By a change in the revenue laws of the state there was no provision whatever for a levy of taxes for the year 1858, but notwithstanding their want of authority, an assessment and levy were made. In 1860 the legislature passed an act legalizing said assessment and levy, and authorized the collection of the same as taxes levied under the provisions of existing laws: See Revision, 1860, p. 130. The case involved the validity of the sale of lands for the taxes of that year, and by virtue of the legalizing act the sale was sus-

tained. In that case, as in this, much stress was placed upon the fact that the levy of the tax was void, and the opinion in effect concedes the illegality of the levy, but it clearly maintains the doctrine that it was competent for the legislature to make valid that which was before void. The court uses this language: "That it is competent to thus legislate we entertain no doubt. The power of the legislature to pass acts of this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity, is, in our opinion, undoubted." As to the levy of the taxes in 1858 being void, see *Iowa R. R. Land Co. v. Soper*, 39 Iowa, 112, where, in commenting thereon, it is treated as "utterly void." That is a stronger case as against appellants than the one at bar, as in this case the acts brought within the purview of the curative act are none of them prohibitive of the right of the land-owner to be heard before the assessment or levy. As to the particular acts legalized, none of them are of such a character that the land-owners would have a legal right to be heard. They were merely determinative of the necessity for such an improvement, the locality, and the listing of lands supposed to be benefited thereby. The case involves no question of damage in consequence of the location of the levee, and the only interest of the land-owner, as distinct from matters of public concern, is his personal liability for the expense of construction. In this respect the curative act affords an opportunity for a hearing before an assessment, both as to the apportionment and assessment, and if aggrieved by the decision of the board, there is the right to appeal. The adjudicated cases relative to local public improvements in our cities and towns, so far as applicable, are all in harmony with such an exercise of power by the legislature, and we do not think it advisable to occupy space with their citation.

2. It is urged that if the proceeding is sustained, it amounts to the taking of private property without just compensation. No more so than in the cases of other imposition of taxes. The law for such an improvement can only be justified on the theory that it is a public necessity; that it is a matter of police regulation, affecting the health, welfare, and happiness of the people. Whether it amounts to that in fact is not the question. The legislature may and does provide for the settlement of such questions of fact by proper agencies, and a mistake as to the fact no more renders the tax imposed for its purpose the taking of property without compensation than

does the imposition of other taxes for special purposes which may afterwards prove fruitless. In this connection we are referred to the case of *Gatch v. City of Des Moines*, 63 Iowa, 718. In that case the defendant city had by resolution provided for the construction of a system of sewers, and that the cost should be assessed upon the adjacent property *pro rata*. The assessment of this *pro rata* share was made without notice to the property owner, and in that respect it was adjudged illegal. There is no holding in the case that the adoption of the resolution to make the improvement, and to burden the adjacent property with the costs thereof was not legal, but before the burden should attach by way of assessment there should be an opportunity for hearing upon notice. This opportunity is clearly and fully given in the case at bar, the curative act fixing the time and place, of which all must take notice.

3. The curative act is assailed as being obnoxious to section 30, article 3, of the constitution, in that it is a local or special law. We regard this as the most doubtful question involved in the entire consideration of the case. The provision of the constitution is as follows: "The general assembly shall not pass local or special laws in the following cases: For the assessment and collection of taxes for state, county, or road purposes. . . . In all the cases above enumerated, and in all other cases where the general law can be made applicable, all laws shall be general and of uniform operation throughout the state." It cannot be questioned that the curative act is both local and special in its application. Its whole tenor and bearing are to that end. It is in aid of a particular and a local enterprise. It can only be sustained upon the theory that a general law cannot be made applicable. Counsel for appellants, in argument, ingeniously, by way of illustration, attempt to show that a general law would reach the object. If the mere wording of the law, without regard to legislative purpose, is to be the guide for constitutional interpretation, we have no doubt that it could be effected. But was such the intention of the framers of the constitution? To so hold is to place ourselves in harmony with the often repeated attempts at legislative evasion, when confronted by constitutional law, which we have no desire to do. It would be difficult to conceive a state of facts that could not be brought within the provisions of a general law, with such a construction. No such purpose was intended by the constitutional enactment, but on the contrary, it presumes conditions under which general laws

are not applicable, and special or local laws are designed. While the legislature might recite the particular facts as to the "island levee," including acts done or omitted, and then provide that whenever such a state of facts should exist certain results will follow, it would be done with a view solely to effect a local and special purpose. The fact that the legislature framed the act in question as it did is evidence of its design, and that it believed that the general law could not be made applicable; and we are not justified in disturbing its acts, on constitutional grounds, except where the infraction is clear, palpable, and plainly inconsistent: *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Board of Supervisors of Polk County*, 30 Id. 9, and cases there cited. By the curative act it was not only the purpose to provide for the assessment and payment for the improvement, but the validity of the location was questioned; and a principal purpose of the act was to legalize that, and constitute it a public improvement. Its accomplishment under general legislation would be very difficult, if not impossible. The line or route of the levee did not conform to the original plan as a whole, and an effort to legalize it by general legislation would have involved a minuteness of description inconsistent with any other like state of facts, and we may here dispose of the question on the theory, at least, that the act is not so clearly obnoxious to constitutional requirements as to justify an interference by us.

4. It is urged that the curative act is vulnerable to the provision of the constitution that "every act shall embrace but one subject, which shall be expressed in the title"; and the argument extends not only to the curative act, but to the prior acts forming a basis for the proceeding to construct the levee. We think it unnecessary to look beyond the curative act itself. Whatever may be true as to former acts, the curative act seems sufficient. The title of the act is, "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine Island, in said counties, and to provide for an assessment of the costs thereof on the lands benefited thereby." The argument proceeds upon the theory that legalizing the proceedings of the board is one subject, and providing for an assessment on the lands is another. It is not different in principle from a law entitled "An act to provide for the construction of an asylum, and to provide means of payment therefor." The one as clearly embraces two subjects as the other, but

neither is objectionable from a constitutional standpoint. The constitutional language is, "Every act shall embrace but one subject, and matters properly connected therewith." It cannot be claimed that in the construction of a public improvement the payment is not a matter properly connected therewith, and it cannot be a matter of valid objection that both are expressed in the title of an act providing for the construction. The curative act is a remedy for any such defects existing prior thereto, if they did exist, and its title is not open to the objection urged.

5. At the trial in the district court there was a demurrer to the petition, which was overruled, after which the defendants made a return to the writ, as required by its terms. At the further hearing there was a change in the *personnel* of the court, and it is urged that the issues presented by the return were the same as those arising on the demurrer to the petition, and that there was a readjudication thereof against the objection of appellants, and its correctness is urged for our consideration. We think the change of judges makes no difference. It is the same court. We are not prepared to hold that if, during the trial of the issues of an action, a court becomes convinced of an error he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain. If, on the trial of the issues presented by the return, questions legitimately arose involved in the issues presented by the demurrer, it was the duty of the court to pass upon them, and in so doing it was not required to follow the ruling on the demurrer as against its convictions. With the proper steps taken to guard the record, it is difficult to see how questions should thus arise, and yet perhaps they may. It is understood that the question arose in this case from the rulings of different judges, and different views as to the law. It was certainly the duty of the defendants, after the ruling on the demurrer to the petition, to make a return of the facts, as such was the requirement of the writ. If it stated facts in exact harmony with the averments of the petition, as is claimed in this case by appellants, there would then be no question of fact, and the law as applicable to the petition must govern. If in that case the court should hold at variance with the holding on the demurrer, we think the last ruling must be the controlling one in that court. In this case, it seems, other issues were made, as testimony was taken, and we think the holding above indicated must govern. The peculiarities of this case may distinguish it from the others of more common practice.

6. It is urged with much earnestness that the prior suit in this court between these parties constitutes a bar to any proceedings under the curative act for the assessment and collection of these taxes, on the ground that by such adjudication the assessment and levy thereof were declared void. The taxes in the former suit were avoided on the ground that there had been no legal assessment or levy. The object of the curative act was to create an obligation on the part of those who had been benefited by the improvement to pay therefor. The act makes direct reference to the adjudication, and provides for a reapportionment and reassessment with a view to a re-determination of the question of liability. We think it was competent for the legislature to so provide. The authority of the legislature to provide for new trials or the re-examination of issues is not questioned. The former trial determined no vested interest or right, and is in no sense a bar to the proceeding under the new law.

7. Quite a number of questions have been urged, not referred to in this opinion, but we have endeavored to discuss the principal ones, and with the space already devoted, we must content ourselves by saying that the questions have received consideration, and we think none of them are fatal to the judgment. Some of the questions argued—with regard to errors and irregularities in the proceedings of the board—are not questions for review in this proceeding. The remedy in such cases is by appeal from the action of the board. The judgment of the district court is affirmed.

STATUTES — CURATIVE ACTS. — Curative or remedial statutes, like other statutes, must not be given a retrospective application, unless it plainly appears upon its face that it was intended so to operate: *Richmond v. Henrico County*, 83 Va. 204. As to the effect of remedial statutes upon tax deeds as evidence: *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182, and note. Remedial statutes are liberally construed: *White Lake Lumber Co. v. Russell*, 22 Neb. 126; 3 Am. St. Rep. 262; *White v. Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *Smith v. Wilcox*, 24 N. Y. 353; 82 Am. Dec. 302. As to when retrospective curative statutes will be allowed to operate and take effect: *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172, and note. A curative statute may be passed to legalize defective proceedings under a former statute only in cases where the legislature has present authority to authorize like proceedings: *Kimball v. Town of Rosendale*, 42 Wis. 407; 24 Am. Rep. 421; compare *State v. Terinus*, 26 Minn. 1; 37 Am. Rep. 395, and note.

STATUTES — LOCAL AND SPECIAL LEGISLATION. — As to what are statutes of local application, and their effect: *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707, and particularly the cases cited in note 716.

FERGUSON v. FIRMEINICH MANUFACTURING Co.

[77 IOWA, 576.]

RIPARIAN PROPRIETORS—RELATIVE RIGHTS OF UPPER AND LOWER. — The lower owner of land on a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. The upper owner will not be allowed to poison or corrupt the stream, but he may, as a rule, use it in a reasonable manner, for reasonable purposes, even for the purpose of carrying off waste matter; and whether the use to which he puts it is reasonable or not must be determined by the circumstances of the case.

POLLUTION OF STREAM—LIABILITY OF UPPER OWNER FOR CONTRIBUTING TO. — If an upper owner on a stream contributes to its pollution after it has been already polluted above him, but what he contributes renders the water unfit for stock and charges it with noxious gases, when before it was fit for stock and free from such gases, he will be liable in damages to the lower owner.

LOWER OWNER WHO CONTRIBUTES TO POLLUTION OF STREAM CANNOT RECOVER damages of the upper owner for polluting it, if his own acts contribute to cause those things of which he complains. But if he sustains damage from the wrongful acts of the upper owner, to which he has not contributed, he may recover.

MEASURE OF DAMAGES FOR POLLUTION OF STREAM. — Where the upper owner on a stream so pollutes it as to not only render the water unfit for stock, but to make it a source of sickness, pain, and discomfort to the lower owner and his family, the lower owner is entitled to recover not only for the depreciation in the rental value of the premises caused by the nuisance, but also such other damage as he may have sustained, including that which has resulted from bodily sickness, pain, and discomfort.

ACTION to recover damages for polluting a stream. There was a verdict and judgment for the plaintiff, and the defendant appealed. Other facts are stated in the opinion.

J. L. Carney, for the appellant.

J. F. Meeker, and Caswell and Meeker, for the appellee.

ROBINSON, J. Plaintiff is the owner of 412 acres of land, through which Linn Creek flows from the southwest in a northeasterly direction, into the Iowa River. He resides upon this land, and uses it in part as a stock and dairy farm. The defendant operates a glucose factory, situate on the creek aforesaid, about half a mile southwest of the farm of plaintiff. Sheds for feeding cattle are located near the factory, and are used in connection with it. Plaintiff claims that in the years 1886, 1887, and 1888, the defendant caused to be discharged into the creek, from its factory and cattle-sheds, large quantities of acids, poisons, manure, and other filth, in consequence

of which the water flowing therein was so polluted that it could not be used for stock or domestic purposes; that in consequence of such discharges the water of said creek emitted unwholesome and noxious vapors and odors; that by reason of the said acts of defendant the plaintiff and his family suffered and became sick, the products of his dairy were greatly injured, and the use of his farm, and stock thereon, were greatly damaged; that before said acts of defendant were committed the said stream furnished excellent water, which was used by plaintiff for his stock, and for domestic purposes; that said stream furnishes the only running water on his farm; and that the said acts of defendant were wrongful. Defendant denies these claims of plaintiff, and alleges that the creek has for years taken and received the drainage and sewage of the southern and eastern part of Marshalltown, including that from slaughter-houses located thereon, factories, fat-rendering establishments, outhouses, and other sources of filth, and that, in consequence, its water becomes unfit for use. Defendant further claims that the contamination of the water, and the vapors and odors of which plaintiff complains, are due to a slaughter-house which is maintained on his land, and for which he is responsible. The evidence shows that during the year 1887 the water of Linn Creek from a point above the glucose factory to its confluence with the Iowa River was in a foul and unwholesome condition, and that noxious odors were exhaled therefrom. Some of the evidence tended to show that acts authorized by defendant contributed largely to produce that condition. There was also some evidence which tended to show that plaintiff was partially responsible for the evils of which he complains.

1. The relative rights of the upper and lower owners of lands intersected by a stream of water were considered to some extent in the case of *Spence v. McDonough*, 77 Iowa, 460. We said in that case that the lower owner has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. The upper owner will not be allowed to poison or corrupt the stream: Washburn on Easements, 332; 1 Hilliard on Torts, 601. In many cases he may use all of its water to supply what are termed his natural wants, as for household purposes and for his stock, but cannot appropriate it all for so-called artificial purposes, as for manufacturing, to the damage of a lower owner: Wash-

burn on Easements, 330; Gould on Waters, sec. 205. The upper owner may, as a rule, use the stream in a reasonable manner, for reasonable purposes, even as a means of carrying off waste matter. Whether the use to which he wishes to devote it is reasonable must be determined by the circumstances of the case: Washburn on Easements, 326; Gould on Waters, sec. 206.

2. It is claimed by appellant that Linn Creek, above the farm of plaintiff, has been used as a common sewer by the city and inhabitants of Marshalltown for many years, and was so used during the time in question; that in consequence of such use its water was polluted and rendered unfit for domestic purposes and for stock, and that defendant, at most, only contributed to the results of which plaintiff complains. But if that be true, it would not relieve defendant from liability in this action. The right to so use the stream is not shown to exist. Plaintiff owned the land involved in this suit before such use of the stream was made, and had a vested right in it, of which he has not, so far as is shown, been deprived. If the claim of defendant be true, it could not escape responsibility for the wrong because others contributed to it. But plaintiff contends that, although the water of the creek had been somewhat contaminated by the sewage of the city and other causes, yet it was, and would have been, good for stock, and would have been free from noxious odors, but for the acts of defendant. Some of the evidence tends to support this claim, and if it be well founded, the plaintiff should recover: Code, sec. 3331; *Platt v. Chicago etc. R'y Co.*, 74 Iowa, 131; *Ewell v. Greenwood*, 26 Id. 377; Wood on Nuisances, sec. 445.

3. In November, 1885, plaintiff leased, for the purpose of putting a slaughter-house thereon, a small tract of ground near his dwelling and on Linn Creek, "with the privilege of the creek." There was evidence to the effect that a slaughter-house was constructed under the lease, and operated during 1887; that much animal matter was thrown therefrom into the creek, and permitted to corrupt its water; that other animal matter was thrown about the slaughter-house, and there permitted to decay; that the slaughter-house was a nuisance, for which plaintiff was in part responsible, and that to that source, and other causes due to him, much of the evil of which he complains is attributable. The responsibility of plaintiff for the condition of the stream and the odors in controversy was put in issue by the answer. Appellant sought to estab-

lish that responsibility during the trial, and asked an instruction in regard to it, which was refused. The court charged the jury that "if it appears that the offensive exhalations complained of were caused by the act or omission of plaintiff himself, or by others, acting without the co-operation, connivance, or assistance of the defendant, then he cannot recover anything on account of such alleged annoyance or disturbance in the comfortable use and enjoyment of his premises"; but it failed to charge them as to the effect of contribution by plaintiff to the results of which he complains. It is insisted by appellee that he is entitled to recover if a wrong has been proven, notwithstanding the fact that he may have contributed to it. We do not think his position is well taken. If he contributed to the wrong, he and defendant were joint wrongdoers. In law, the act of each was the act of both. It was said in *Turner v. Hitchcock*, 20 Iowa, 318, that there is no contribution among tort-feasors who have all knowingly committed a wrong, and that the damage is not severable or apportionable between them: See also 1 Hilliard on Torts, 176, note 3; *Metz v. Soule*, 40 Iowa, 238; *Cassady v. Cavenor*, 37 Id. 300. It is true, the answer charges that the damage of which plaintiff complains was the result of his own act in maintaining a slaughter-house; but it also sets out various alleged acts of plaintiff which were contributory in their nature; and the efforts of defendant during the trial were largely directed to showing contribution on the part of plaintiff. The instruction in regard to contribution asked by defendant was objectionable in some respects, but it directed attention to that issue, and an instruction in regard to it should have been given. Acts of plaintiff sufficient to defeat his recovery would be such as contributed to cause those things of which he complains. If he has sustained damage from the wrongful acts of defendant to which he did not contribute, then he should recover therefor. The evidence seems to show that different portions of plaintiff's farm were devoted to different uses. Some of his stock was kept in a field between the slaughter-house on his premises and the factory and sheds of defendant. It may be that the alleged wrongful acts of plaintiff did not affect the water of the stream so far up as that field, and that he would be entitled to recover as to that and the cattle kept therein, or if his acts did not contribute to the odors in controversy, he may be entitled to recover the damage caused by them, the liability of defendant being established; but he

cannot recover for a wrong for which he is in whole or in part responsible: *Field on Damages*, 21.

4. The court charged the jury as follows: "If you find for the plaintiff, the measure of his recovery will be the difference, if any, between the fair and reasonable value of the use of his premises as they would have been without the alleged nuisance, and the fair and reasonable value of said premises with the alleged nuisance, with such other and further sum as will fairly and reasonably compensate him for the bodily sickness, pain, and discomfort which he has suffered (if, from the evidence, you find he has suffered any) by reason of the nuisance or offensive exhalations from the creek, occasioned by defendant's wrongful act in contaminating it, if such wrongful contamination has been proved." It was clearly erroneous, and probably the result of an oversight, to charge the jury that the measure of plaintiff's recovery would be the difference between the value of the use of the premises in one case and the value of the premises in the other. It is contended by appellant that depreciation in rental value of the premises is not a proper measure of remedy in the case; that the measure would be the expense of watering stock from a well, or putting in a wind-mill, or replacing the supply of water by other means. But plaintiff complains of a nuisance which affected the use and enjoyment of his home and farm. The loss of water was only a part of the damage he claims to have sustained. In such cases, the depreciation in rental value may be considered: *Randolf v. Town of Bloomfield*, 77 Iowa, 50; *ante*, p. 268; *Shively v. Cedar Rapids etc. R'y Co.*, 74 Iowa, 170; 7 Am. St. Rep. 471; *Loughram v. City of Des Moines*, 72 Iowa, 384.

5. It is further urged by appellant that plaintiff is not entitled to recover for bodily sickness, pain, and discomfort, and that the portion of the charge quoted is erroneous in permitting recovery for them. We held in *Randolf v. Town of Bloomfield*, *supra*, that the person injured was not limited in his recovery to the damages sustained by reason of the depreciation of the rental value of the property affected by the nuisance, but that he was also entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment of the property by himself and family. In *Loughram v. City of Des Moines*, *supra*, we decided that recovery might be had for loss of time and expense incurred by reason of sickness, in addition to the depreciation in rental value of the premises. It is the policy of the law to allow to

the injured party full compensation for all injuries sustained: *Randolf v. Town of Bloomfield*, *supra*, and cases therein cited. Following that rule, we conclude that there may be a recovery for such special damages as plaintiff may have suffered, including that resulting from sickness, pain, and discomfort: Code, sec. 3331; *Ellis v. Kansas City R'y Co.*, 68 Mo. 131; 21 Am. Rep. 436; 3 Sutherland on Damages, 415-417; *Kearney v. Farrell*, 28 Conn. 320; 73 Am. Dec. 677.

6. Complaint is made of the action of the court in giving other portions of the charge, and in refusing to give instructions asked by defendant. What we have already said indicates our views on the questions thus raised. Other questions discussed by counsel may not arise on another trial.

For the errors pointed out, the judgment of the district court is reversed.

WATERCOURSES — RIPARIAN RIGHTS. — Liability of Upper Proprietor. — There are certain duties incumbent upon an upper riparian proprietor with respect to the riparian proprietors below him, and failing to observe these duties, he becomes liable. He is liable for unlawfully and unreasonably diverting waters: *Hammond v. Rose*, 11 Cal. 524; 7 Am. St. Rep. 258; *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788; *Heilbron v. Fowler etc. Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note; *Redman v. Forman*, 83 Ky. 214; *Bliss v. Johnson*, 76 Cal. 597; *Heilbron v. Kings River etc. Co.*, 76 Id. 11; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72; *Anderson v. Cincinnati S. R'y*, 86 Ky. 44; 9 Am. St. Rep. 263; *Heilbron v. Land and Water Co.*, 80 Cal. 189; or for unduly increasing the natural flow of water upon the property below: *Grant v. Kuglar*, 81 Ga. 637; *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797; *Boynton v. Longley*, 19 Nev. 69; 3 Am. St. Rep. 781, and cases cited in note 788; or for obstructing the natural flowage unnecessarily: *Stewart v. Schneider*, 22 Neb. 286; *Sipsey River etc. Co. v. Georgia P. R. R. Co.*, 87 Ala. 154; *Bliss v. Johnson*, 76 Cal. 597; or for polluting the waters: *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Ulbricht v. Eufaula Water Co.*, 86 Id. 587; 11 Am. St. Rep. 72; *Kiernan v. Chicago etc. R'y Co.*, 123 Ill. 188.

Liability of Lower Proprietor. — The lower proprietor is liable for backing water by means of artificial dams, etc., upon the lands of the upper riparian owner: *Sullens v. Chicago etc. R'y Co.*, 74 Iowa, 659; 7 Am. St. Rep. 501, and particularly note; *Pixley v. Clark*, 35 N. Y. 520; 91 Am. Dec. 72, and note; *Moore v. Chicago etc. R'y Co.*, 75 Iowa, 263; *Stumbo v. Seeley*, 23 Neb. 212.

MELOY v. CHICAGO AND NORTHWESTERN R'y Co.

[77 IOWA, 742.]

RISKS ASSUMED BY CONSTRUCTING ENGINEER OF RAILROAD BY VIRTUE OF HIS EMPLOYMENT. — An engineer employed in the construction of a railroad track, but not responsible for its condition after it is laid, assumes, by virtue of his employment, such risks as are incident to the operation of trains upon such a track in a reasonably prudent and careful manner; but he does not assume risks which are the result of running trains at an unreasonably high rate of speed over a track in a bad and dangerous condition. And if he is injured by the derailment of a train through the company's negligence in caring for and keeping the newly made track in place, and in running such train at a dangerously rapid rate over a wet and yielding track, the company will be liable.

EVIDENCE THAT OTHER TRAINS WERE RUN OVER SAME TRACK ON SAME DAY AT SAME RATE of speed as the train on which the plaintiff was injured is not admissible to show that the company was not negligent in running such train; nor is it admissible to show that the company had no notice of the condition of the track at the time, when other evidence, which this could not overcome, abundantly proved that it had such notice.

JURY MAY FIND THAT TRAIN WAS NEGLIGENTLY RUN at a dangerous rate of speed, without the aid of expert or direct testimony, where the evidence shows that the track was uneven, that it contained short curves caused by the sliding of the track on the wet clay, and that in places one side was up on planks while the other was out of sight in the mud, and the rate of speed was described by the witnesses.

CONTRIBUTORY NEGLIGENCE, QUESTION OF, PROPERLY SUBMITTED TO JURY WHEN. — Where at the time an accident occurred, through which the plaintiff was injured, he was riding in a caboose, used as a tool-car, near the engine, and there was, at the other end of the train, an old box-car, fitted up as a way-car, but it did not appear that he knew that the box-car was a stronger or safer car to ride in than the caboose, and it further appeared that the box-car was no better adapted to the use of travelers than the caboose, but was less convenient, and there was evidence tending to show that he was, on the occasion of the accident, one of a wrecking-crew, riding in the place assigned to them, the question whether he was guilty of contributory negligence in riding in the caboose instead of in the box-car was properly submitted to the jury, although the event showed that he would not have sustained the injury had he been riding in the box-car at the time the accident happened.

ACTION for personal injuries. The opinion states the case.

Hubbard, Clark, and Dawley, for the appellant.

Ward and Harman, and Mills and Keeler, for the appellee.

ROBINSON, J. In the summer of the year 1884, plaintiff was in the employment of defendant, and was engaged as a civil engineer in superintending the laying of the track on a new line of railway which defendant was then constructing from Belle Plaine to What Cheer. He was not required to see that

the track was kept in good condition after it was laid. On the third day of August of the year named, the track had been laid from Belle Plaine to a point about thirty-five miles south. On that day, plaintiff, who was in Belle Plaine to visit his family, was ordered to go to the front with a wrecking-train, which was going down to assist in replacing on the track a derailed engine. The train consisted of an engine, which was run backwards, pushing the tender and pulling the cars, a wrecking-car with derrick next to the engine, an old way-car, fitted up and used as a tool-car, next to the wrecking-car, three flat-cars loaded with steel rails, three loaded with ties, and at the rear end a box-car, fitted up and used as a way-car. The plaintiff, with other employees of defendant, rode in the tool-car. At a point about twenty-one miles south of Belle Plaine, the engine, derrick-car, tool-car, and forward trucks of the first car of rails left the track, and the tool-car was badly broken. At the moment of the accident, plaintiff was standing on a platform of the tool-car, whither he had gone, as he states, for the purpose of jumping from the train, under the belief that an accident was imminent. He was caught between two cars in such a manner that his left leg was crushed, making amputation necessary. Other injuries were also received. The evidence on the part of plaintiff tends to show that the track where the accident occurred was in bad condition at that time; that it was laid through a deep cut, over wet, soft earth; that it had settled unevenly, and was out of line; that the condition had been made worse by a storm of rain the night before; and that, at the time of the accident, the train was running from twelve to seventeen miles an hour. The way-car did not leave the track.

Plaintiff charges that the train was negligently run at too high a rate of speed over a track known to defendant to be in a dangerous condition, by an inexperienced and incompetent engineer; and that he did not contribute to the injuries of which he complains. The jury found specially that defendant was negligent in maintaining and repairing the road-bed and track at the time and place of the accident; that the train in question was "running at a dangerous and negligent rate of speed, considering the condition of the road-bed at that place and time"; and that plaintiff was not guilty of contributory negligence. The amount of the verdict and judgment was ten thousand dollars. An opinion was filed in this cause

on a former submission, but a rehearing was granted on the petition of appellant, and the cause again submitted.

1. It is contended by appellant that the risks incident to riding over a new, partially completed road-bed and unballasted track were necessarily contemplated in the employment of plaintiff; that the accident in question was a risk of that kind, and therefore that he is not entitled to recover in this action. But plaintiff only consented to incur such risks as were incident to the operation of trains upon such a track in a reasonably prudent and careful manner. He did not assume risks which were the result of running trains at an unreasonably high rate of speed over track in a bad and dangerous condition. Defendant was chargeable with knowledge of the condition of its track at the place of the accident. It knew that it was laid over wet and yielding earth, that proper drains had not been constructed to carry off the rainfalls and the water which came from the banks, and that the storm of the night before had aggravated the bad condition of the road-bed, and had made greater caution in running trains over it necessary. There was conflict in the evidence as to the condition of the track and the rate of speed at which the train in question was run, but there was evidence tending to support the special findings of the jury that defendant was negligent in not keeping the road-bed and track in better condition, and that it was negligent in the matter of running the train. Plaintiff did not assume any risk resulting from such negligence. He had, it is true, superintended the laying of that portion of the track in controversy, but it was laid several weeks before the accident occurred, and plaintiff's responsibility, therefore, had ceased. It was then in charge of the road-master.

2. Appellant complains of the refusal of the court below to allow it to prove that similar trains had been run at the same rate of speed over the same track on the same day, without any appearance of danger. Appellant was permitted to prove the condition of the track at the time in question, and for some time before. The fact that other trains were run over it just before the accident, at the same rate of speed, would not justify a negligent and improper running of the train in question. The condition of the road-bed was such that the passing over it of loaded trains made it more dangerous. It is urged on rehearing that the evidence was admissible to show that defendant did not have notice of the condition of the road.

That point was not made on the first submission of the cause, but it would hardly be sufficient to accomplish the purpose now claimed for it. It might show that the locomotive-engineers who ran the trains in question did not know that the condition of the road was bad; but it appears that the engineer who ran the train which was wrecked, the road-master, who was directly responsible for its condition, and other employees, knew or were chargeable with the knowledge of its condition.

3. It is further contended by appellant that there was no evidence that the train was run at an unsafe rate of speed. It is true that no witness testified specifically that the speed was too great to be safe. But there was evidence showing that the track was uneven; that it contained short curves caused by the sliding of the track on the wet clay; that in places one side of the track was raised on planks, while the other side was down in the clay, and was, as stated by one witness, "out of sight, in the mud." The cars swayed from side to side in such a manner as to cause plaintiff to believe that there was danger that the train would be ditched. The rear brakeman applied brakes, without orders, in anticipation of danger, to check the speed of the train. It did not require an expert to tell that the condition of the track made the rate of speed dangerous. It was competent for the jury to find that the train was negligently run at a dangerous rate of speed from the evidence submitted.

4. The court charged the jury as follows: "If you find, from the evidence, that at the time of the departure of the wrecking-train on which the plaintiff took passage the defendant had provided a safe and suitable car on said train for the accommodation of the employees of the defendant in riding on said train, then the plaintiff, in the exercise of ordinary care and prudence, was in duty bound to take passage on such car, and if he neglected so to do, and sought a more dangerous part of the train on which to ride, and was thereby injured, then such act was negligence on the part of plaintiff; and if such negligence directly contributed to his own injury, then he ought not to recover. But if you find, from the evidence, that the defendant had provided more than one car on said train for such purpose,—that is, if in this case you find that the so-called 'way-car' and the so-called 'tool-car' were both provided by defendant for such purpose,—or if you find, from all the facts and circumstances connected with the making up and operating of the train by the defendant, that the plaintiff

had good and reasonable grounds for believing, and that he did honestly believe, in the exercise of ordinary care and prudence, that both of said cars had been so provided for such purpose, then he was justified in selecting either car for his passage as to him seemed best in the exercise of such ordinary care and prudence,—under such state of facts plaintiff would not be negligent. If you find, however, from all the facts and circumstances connected with the case, that a man of ordinary care and prudence, under such circumstances, would not have acted as plaintiff did, but that, in the exercise of such ordinary care and prudence, he would have taken passage in the rear caboose as a safer place, and would have avoided the tool-car as a more dangerous place, then the plaintiff was guilty of negligence, and if such negligence contributed directly to produce his injuries, he ought not to recover.” It is insisted by appellant that the verdict is contrary to this paragraph of the charge, for the reason that the way-car, at the rear of the train, was a safer place than the tool-car in which to ride, and that by riding in the latter plaintiff contributed to the injuries of which he complains.

The cases of *Player v. Burlington etc. R'y Co.*, 62 Iowa, 727, and *Doggett v. Illinois Cent. R'y Co.*, 34 Id. 284, are especially relied upon by appellant as supporting its claim; but this case is different from those in several important particulars. In this case, the road of defendant had not been opened to the public for traffic. The plaintiff was not a passenger within the ordinary meaning of that term, nor was he a trespasser. He was rightfully on the train. Some of the evidence tends to show that he had been directed to aid the wrecking-crew in replacing the derailed engine, and that he was acting in response to that direction. It is true that it was not a part of his duty to do so, but if he had been asked to render assistance in that work by competent authority, and had consented to do so by word or act, he became on that occasion, for all practical purposes, a part of the wrecking-crew, and was entitled to ride in the place provided for them. The tool-car was made for a caboose or way-car, with platforms at the ends, doors, steps, and seats, but at the time in question was used as a car in which to carry a supporting-jack, switch-rope, block, pulley, chain-hooks, bars, and other articles used in connection with wrecks. It contained accommodations for a wrecking-crew, and was occupied by some of them on the trip in question. The car at rear of the train, used as a way-car or

caboose, had been in use for some weeks, and was used for transporting employees of defendant, and supplies, tools, and various articles, as frogs and a wire switch-rope. At the time of the accident it contained an ice-box, a tool-box, and perhaps other articles of the kinds already named. It was an ordinary box-car, which had been furnished with seats, and steps at the sides. So far as the evidence shows, it was no better adapted to the use of travelers than was the tool-car, and less convenient. It is said that the latter was an old, weak car,—a mere “egg-shell”; but one of the witnesses for defendant testified that there was not much difference as to strength between it and an ordinary freight-car. The evidence does not show that plaintiff was aware of any weakness in the car, nor that he was directed to ride elsewhere, although the conductor knew where he was riding. In view of all these facts, we are of the opinion that it cannot be said, as a matter of law, that plaintiff was negligent in riding in the tool-car, nor that it was more dangerous than the way-car. It is true that if he had been in the latter when the accident occurred he would have escaped injury, but the course pursued by plaintiff must be considered in the light of the circumstances which induced him to ride in the tool-car rather than in the light of subsequent events. The relative safety of the different cars of a train must depend, not alone upon the places they occupy with respect to the engine, but in part upon the dangers to be encountered. In case of a front-end collision or a broken bridge, the safest car might be the one farthest from the engine; while in case of a defective road-bed, which is made more dangerous by each passing car, the safest car might be the one next the engine. We think it was for the jury to determine, from all the evidence submitted, whether or not plaintiff contributed to his injuries, and they found specially that he did not. It is not shown that he rode in a car not designed by defendant for that purpose. If he was in fact one of the wrecking-crew, and, in the exercise of ordinary care and prudence, rode in the place provided for them, he was not guilty of contributory negligence. The charge, as an entirety, submitted fairly and with sufficient fullness the various issues involved, including the question of plaintiff's negligence. We cannot say that the verdict is contrary to the charge, nor that it is unsupported by the evidence. The facts of the case are unusual, and must govern its determination.

5. The special findings of the jury render it unnecessary to

consider some of the assignments of error. We discover no error in the case prejudicial to appellant. A rehearing was granted in this case because of some language in the former opinion, in regard to the alleged negligence of plaintiff, which does not correctly represent the views of this court. We reach the same conclusion which we did on the first submission. The judgment of the superior court is affirmed.

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT — Note to *Wilson v. Dunreath etc. Co.*, ante, p. 307; *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263, and note. The employee assumes all risks and perils usually incident to his employment, among which are such as it is his duty to take knowledge of by observation: *Illick v. Flint etc. R. R. Co.*, 67 Mich. 632.

NEGLIGENCE — QUESTION FOR WHOM. — As a general rule, negligence is a question for the jury: *Lyberg v. Northern P. R. R. Co.*, 39 Minn. 15; *Lindstrand v. Delta Lumber Co.*, 65 Mich. 254; *Baldwin v. St. Louis etc. R'y Co.*, 72 Iowa, 45; *State v. Union R. R. Co.*, 70 Md. 69; *Drevis v. Woods*, 71 Wis. 329; but when the evidence is entirely free from conflict, negligence becomes a question for the court to determine: *Louisville etc. R. R. Co. v. Perry*, 87 Ala. 392; *Missouri P. R'y Co. v. McCally*, 41 Kan. 639; *Pichel v. Phenix Ins. Co.*, 119 Ind. 292; compare *Schilling v. Chicago etc. R'y Co.*, 71 Wis. 255, *Schmidt v. Bauer*, 80 Cal. 555, and *Savannah etc. R'y Co. v. Folts*, 76 Ga. 527, for instances of cases in which the court should have passed upon the question of negligence and granted a nonsuit.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

ENGLAR v. OFFUTT.

[70 MARYLAND, 78.]

TRUST FUNDS MIXED WITH THOSE OF TRUSTEE, IDENTIFICATION OF. — So long as trust funds which the trustee has misapplied, or converted into other property, or mixed with his own funds, can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow his right to be defeated by the wrongful act of the trustee or fiduciary in mixing or confusing the trust funds with his own, or even with those of a third party.

RIGHT OF OWNER OF FUND TRACED TO POSSESSION OF ANOTHER. — The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him; and it makes no difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened.

TRUST PROPERTY, HOWEVER CHANGED, CONTINUES SUBJECT TO TRUST. — As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.

LIABILITY OF PARTNERSHIP FOR MISAPPROPRIATION OF TRUST FUND BY MEMBER OF FIRM. — The mere fact that a partner who is a trustee or fiduciary improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, is not, without anything more, sufficient to entitle the *cestui que trust* to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case, the firm itself must be shown to have been implicated in the breach of trust, and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it.

PETITION. The opinion states the case

Robert Biggs and Fielder C. Slingluff, for the appellants.

Milton W. Offutt and John Prentiss Poe, for the appellee.

ALVEY, C. J. Prior to the 21st of May, 1883, and down to the 1st of January, 1886, John P. Shriner was a merchant, and manufacturer of harness, in the city of Baltimore, and he carried on the business under the name and style of John P. Shriner & Co., though he was the only person interested in the business. On the 21st of May, 1883, he was appointed by the orphans' court of Carroll County guardian of Mary and John Englar, infants, and received into his possession, as belonging to his wards, the sum of \$10,846.25. Of this sum there was deposited by Shriner, on the day of its receipt by him, that is to say, the 21st of May, 1883, in the Howard Bank of Baltimore, to his own credit, in an account kept in the name of John P. Shriner & Co., the sum of \$10,238.20. As against this and all other credits in such account, amounting in the aggregate, between the date just mentioned and the 28th of August, 1883, to the sum of \$28,804.13, John P. Shriner checked and otherwise drew out, as he needed the money, various sums, amounting in the aggregate to the sum of \$28,755.64; so that, at the date last mentioned, there remained in bank to his credit on this account only the small balance of \$48.49. The money appears to have been drawn out of bank for various purposes; some of it to be loaned out, a considerable portion of it to take up outstanding paper payable by Shriner, and some of it to pay bills of merchandise, etc. Shriner also kept an account in the Manufacturers' National Bank of Baltimore, during the same time of the account in the Howard Bank, but there is nothing to show that there was any specific sum belonging to the Englar trust fund deposited to his credit in that account. There were a great many deposits made to his credit in that account, but there is nothing to indicate that any portion of them belonged to a trust; and the checks against the credits in that account, down to the 1st of September, 1883, had reduced the balance in favor of Shriner to the small sum of \$34.01.

For some time immediately preceding the 31st of December, 1885, Edward C. Shriner, a younger brother of John P., had been a clerk in his brother's store; and on the 31st of December, 1885, the brothers entered into the following agreement: "That John P. Shriner, owning the business of John P.

Shriner & Co., hereby agrees to associate with him in said business the said Edward C. Shriner, upon the following terms and conditions: The said Edward C. Shriner is to receive for his services, to be rendered in said business, the annual salary of \$624, and is to receive, in addition thereto, one tenth part of the profits of said business, as carried on in the city of Baltimore, or elsewhere, by said firm, after all expenses, including the said salary, are paid and satisfied; John P. Shriner is to have the right alone to sign all checks, notes, etc., of said firm, and to conduct the business thereof as he shall think proper, and to the best interest of both, as he has heretofore carried on said business. And the said Edward C. Shriner, in consideration of said salary and said interest in said firm, hereby agrees to devote his whole time and attention to said business. Witness our hands and seals."

By this agreement, and the clear intention of the parties thereto, Edward C. Shriner was made a partner with his brother in the business, with all the responsibilities of a partner to creditors and other third parties dealing with the firm. And being such partner, and interested in the discharge of partnership obligations, it was his right to require that all the partnership funds and effects be directly and regularly applied to the payment of partnership debts; and it is only after all partnership debts are paid that the separate debts of the partners can be paid from partnership assets. It was in respect to these rights, and this order of payment of debts, that the general assignment for the benefit of creditors, executed by the partners on the 15th of November, 1886, made provision. To this order of payment, the creditors of the firm of John P. Shriner & Co. are, by the terms of the deed of assignment, entitled to insist, unless some superior right be shown.

It appears that the trustee, to whom the general assignment was made, sold at private sale all the partnership property and assets of every kind for the sum of nine thousand five hundred dollars, and which sale was ratified by the court. The trustee has in his hands of this purchase-money the sum of \$6,543.60 for distribution to those entitled to receive it.

In this state of case, the appellants filed their petition, stating the facts under which John P. Shriner received their money, and alleging that he applied the same to the use of the firm of John P. Shriner & Co.; and that "the said firm received said money with full knowledge as to its character,

and as to the violation of his trust by the said John P. Shriner, guardian as aforesaid, and used said money in the business of said firm, converting the same into stock and material used in the said business"; and that "while still holding said money and using the same in their business as aforesaid, the members of said firm, including the said John P. Shriner," made the general assignment for the benefit of creditors. The petition then proceeds to allege the amount of money realized from the sale of the partnership effects remaining in the hands of the trustee; and after alleging the amount due them from their guardian, the appellants "charge that they are entitled to priority over other creditors of the firm of John P. Shriner & Co. in the distribution of the net proceeds of the sale of the stock of said firm," now subject to the control of the court for distribution.

The matter of the petition was referred to the auditor of the court, with power to take testimony, and to state an account. Testimony was taken, and an account stated; but the auditor finding nothing in the evidence, according to his view, to justify the application of the fund to the claim of the appellants, he distributed the entire fund to the claims of the partnership creditors. To this account the appellants excepted; but their exceptions were overruled, and the account ratified, and the petition of the appellants was dismissed. It is from that order that this appeal is taken.

The appeal presents two questions: 1. Whether the trust fund belonging to the appellants is traceable under the facts of this case so as to be identified with reasonable certainty, and shown to be the fund that is ordered to be distributed to the general creditors of the partnership, under the deed of assignment; and if not, 2. Whether the appellants are entitled as creditors of the partnership to share in the distribution of the fund.

1. The principle upon which trust funds may be traced, when attempted to be misapplied, or where they have been converted into other property, or become mixed with other funds belonging to the trustee or fiduciary, is a very plain one, and all the difficulty that is found to exist is in matters of fact, and in identifying the fund. So long as a trust fund can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow the right to be defeated by the wrongful act of the trustee or fiduciary in mixing or confusing the trust fund with funds of his own, or even those

of a third party. The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him. And it can make no manner of difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened. The doctrine has been recognized and applied in courts of equity from a very early period; but it has recently undergone full and elaborate discussion, with ample illustration, both in the English court of appeal and the supreme court of the United States, where all the authorities have been reviewed. In the cases *In re Hallett's Estate*, and *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, 758, it was held by the court of appeal that where money had been received by a person in a fiduciary character, though not as technical trustee, and had paid it to his account at his banker's, the person for whom he had received the money could follow it, and had a charge on the balance in the banker's hands as shown by the account. And in order to protect the rights of the *cestui que trust*, and as means of effectuating justice, by the application of an established principle, it was further held that if a person who holds money as a trustee, or in a fiduciary character, pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks, from time to time, in the ordinary manner, the general rule laid down in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply, and that the drawer must be taken to have drawn out his own money, rather than that belonging to the trust. It was in regard to this latter point that some of the previous English cases were criticised and dissented from by the court of appeal.

In the case of *National Bank v. Insurance Co.*, 104 U. S. 54, the supreme court, approving and following the decision of the English court of appeal in the matter of Hallett's estate, held that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and if a trustee or fiduciary mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his from that which belongs to the trust; that this doctrine applies, in every case of a trust relation, as well to money deposited in

bank, and to the debt thereby created, as to every other description of property. Indeed, it may be stated as the clear result of the authorities, to use the language of Lord Justice Turner, in *Pennell v. Deffell*, 4 De Gex, M. & G. 372, "that as between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." This is so, said Lord Ellenborough in *Taylor v. Plumer*, 8 Maule & S. 562, and repeated by Jessell, M. R., in the case of *In re Hallett's Estate*, *supra*, for the reason "that the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." The sole question, therefore, in every case where trust property is attempted to be traced, is, whether it can or cannot be identified, either in its original or altered form.

In this case there is no difficulty in tracing the trust fund into the Howard Bank account kept by John P. Shriner in the name of John P. Shriner & Co. It was deposited to his credit immediately upon its receipt by him. But the bank account, as exhibited in the record, shows that on the 28th of August, 1883, all the credits, including the trust fund, had been drawn out, leaving only the trifling balance of \$48.49. The contention of the appellants is, that the trust fund drawn out of bank was invested in the business of John P. Shriner & Co., and because so invested they have a right to pursue the stock of goods found in the store more than three years afterwards, and to fix a charge upon the proceeds of the sale of those goods, to the exclusion of the claims of all other persons. But John P. Shriner testifies, and the bank account itself shows, that a large portion of his credits in the account, including this trust fund, was drawn out for purposes of loan, and for taking up outstanding notes, and various other purposes, and only a comparatively small portion applied to the payment of merchandise accounts. The bank account was a continuing one, it is true, but it is not pretended that there is anything in the record to show that any portion of this trust fund, as such, was ever returned into the bank account after the 28th of August, 1883. Other trust funds, amounting to about ten thou-

and dollars, derived from another source, were placed in the account to the credit of John P. Shriner & Co., some time after the 28th of August, 1883; but if the testimony of John P. Shriner is to be relied on, all the trust fund now claimed had been spent, in one way or another, before that time. And such being the case, the claim of the appellants upon the fund for distribution is altogether too indefinite. At most it is but matter of conjecture; for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or if any, what portion, of the stock of goods that passed into the hands of the assignee, under the general assignment for the benefit of creditors, was the product of the trust fund belonging to the appellants. Indeed, according to the evidence in the case, the stock of goods, or much the greater part of it, that passed to the assignee, and which produced the fund for distribution, had been purchased on credit, and many of the creditors who claim the fund are persons who sold the goods to the firm. It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants.

2. But suppose, at the time of the partnership formed between John P. Shriner and Edward C. Shriner, that some portion of the trust fund remained invested in the stock of goods then on hand, or was otherwise employed in the business; in such case, the question whether the appellants can be entitled to occupy the position of creditors of the firm, so as to share in the distribution of its assets and to hold Edward C. Shriner liable, depends upon the fact whether Edward C. Shriner had notice of and acquiesced in the breach of trust by John P. Shriner, the guardian. For the principle of law is very clear, that if a partner, being a trustee or fiduciary, improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, this fact alone, and without anything more, is not sufficient to entitle the *cestui que trust* to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case the firm itself must be shown to have been implicated in the breach of trust; and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. But if the other partners have knowledge of such misuse of trust money, and know that such money is being

employed in the partnership business for common benefit, they will all be bound for the money so employed, and be made answerable for the breach of trust committed by their copartner, with their acquiescence: *Ex parte Heaton*, Buck, 386; *Ex parte Apsey*, 3 Bro. C. C. 265; *Smith v. Jameson*, 5 Term Rep. 599; *Ex parte Watson*, 2 Ves. & B. 415; Story on Partnership, sec. 368; 1 Lindley on Partnership, 5th ed., 161. Here, however, the proof would seem to establish the fact of the entire absence of knowledge on the part of Edward C. Shriner of the use of trust money by John P. Shriner in the partnership business; and, in this class of cases, it is clearly established by the authorities that the knowledge of the partner committing the breach of trust does not affect the other member of the firm: 1 Lindley on Partnership, 161. Edward C. Shriner swears that he had no such knowledge; and he is fully supported in his testimony as to this fact by the testimony of his brother, who swears that no part of the trust fund was used in the business after the formation of the partnership. It is true, Mr. Englar testifies to a declaration or admission made by Edward C. Shriner to the effect that he knew that the trust money was used in the partnership business. But we think there must be some mistake or misunderstanding in regard to the matter, as Edward C. Shriner is emphatic in denying that he ever made such declaration, and he is strongly corroborated in this by the testimony of his brother and the circumstances of the case.

Upon the whole, we are of opinion that the court below committed no error in overruling the appellants' exceptions to the auditor's account and distribution, and in dismissing the petition, and the order appealed from will, therefore, be affirmed.

TRUSTS AND TRUSTEES — FOLLOWING TRUST FUNDS. — Trust property may be followed by the *cestui que trust* so long as it can be traced or identified: See Flint on Trusts, sec. 318. Trustee must not intermingle trust funds or trust property with his own individual funds or property: *Id.*, sec. 164; *Coffin v. Bramlett*, 42 Miss. 194; 97 Am. Dec. 449; for one who willingly places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by intermingling or mixing it with his own, will be compelled to bear the inconvenience of the confusion, even to surrendering up the whole, if the respective shares cannot be distinguished: *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 11 Col. 228; 7 Am. St. Rep. 228; *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233, and note; *First Nat. Bank v. Schween*, 127 Ill. 573; 11 Am. St. Rep. 174, and note.

TRUSTS AND TRUSTEES. — A trust in realty arises at the inception of the title, depending solely upon the facts occurring at and prior to that time;

and it cannot be changed by any subsequent transaction, except as such transaction may throw light upon the original transaction: *Hughes v. White*, 117 Ind. 470.

TRUSTS AND TRUSTEES. — When trust property is conveyed to an innocent purchaser for value, in fraud of the trust, the trustee must answer to the *cestui que trust* for all moneys derived from the trust property: *Adams v. Lambard*, 80 Cal. 426.

STATE v. HOUSEKEEPER.

[70 MARYLAND, 162.]

SURGEON IS JUSTIFIED IN PERFORMING OPERATION UPON MARRIED WOMAN, with her consent, if he deems it necessary for the preservation and prolongation of her life.

HUSBAND HAS NO RIGHT TO WITHHOLD FROM HIS WIFE SUCH MEDICAL ASSISTANCE as her case may require.

WIFE'S CONSENT TO PERFORMANCE OF SURGICAL OPERATION UPON HER IS SUFFICIENT to justify such performance, without proof of her husband's consent thereto.

CONSENT OF PERSON SUBMITTING TO SURGICAL OPERATION IS PRESUMED, unless he was the victim of a false and fraudulent misrepresentation. If want of consent is alleged, it must be proved by the party who charges it.

SURGEON IS BOUND TO EXERCISE ORDINARY CARE AND SKILL in the performance of an operation upon a patient, and therefore the law presumes, in the absence of proof to the contrary, that the operation was carefully and skillfully performed.

DEATH OF PATIENT, SURGEON NOT LIABLE FOR, WHEN. — If the death of a patient upon whom a surgeon has performed an operation results from disease, and not from the operation, the surgeon is not liable for such death. And even if the disease resulting in the patient's death is caused by the operation, the surgeon is not liable if he performed the operation with the patient's consent, and under the belief that the operation was proper to be performed.

DEGREE OF CARE AND SKILL REQUIRED OF SURGEON IN PERFORMANCE OF OPERATION upon a patient is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients; and if want of such care and skill is alleged, it must be proved by the party alleging it.

ACTION for damages. The opinion states the case.

Albert Constable, for the appellant.

Charles O. Crothers and John W. Falls, for the appellees.

YELLOTT, J. An action for damages was brought against the appellees, who are physicians residing in Cecil County. It is alleged in the declaration that they caused the death of one Matilda Janney, by unskillfully or wrongfully performing a surgical operation. The action was brought in the name of

the state for the benefit of the appellants, one of whom was the husband, and the others were the children, of the deceased. Under the provisions of article 67 of the Maryland code, if the death is caused by the wrongful act, neglect, or default of the defendant, a suit may be instituted for the benefit of the husband, wife, parent, or child of the deceased.

The evidence shows that the deceased had been afflicted by the formation of a lump in her right breast. It was supposed at first to be a tumor, but afterwards ascertained to be a cancer. The defendant Housekeeper, a regular physician, was consulted, and advised a surgical operation. A day for the performance of the operation was appointed, and the two defendants and another physician were present, and performed the operation by cutting off the entire right breast. The operation was performed about the 1st of June, and the death occurred on the 5th of December following, and is not attributed with any degree of certainty to the effects of the surgical operation. Some portions of the evidence tend to prove that the wound caused by the surgical instruments was entirely healed, and that death was produced by tubercular *meningitis*. In the conflict of testimony, this was a fact to be determined by the jury. The husband of the deceased, who is one of the equitable plaintiffs, relies upon the fact that, although he expressed a willingness that there should be an operation for a tumor, he did not consent to the excision of a cancer. He says that he told Dr. Housekeeper that if the formation in the breast was a cancer, he objected to its removal. His own testimony shows that he assisted the physicians in preparing to perform the operation, and though not in the room where it was performed, was near at hand. He says he supposed that the medical men were operating for a tumor, and that he would not have consented to an operation for a cancer. There is evidence from which a jury might infer that the patient knew that the formation in her breast was a cancer. When the doctors came to the house, she had already prepared herself to undergo the operation. If she consented to the operation, the doctors were justified in performing it, if after consultation they deemed it necessary for the preservation and prolongation of the patient's life. Surely, the law does not authorize the husband to say to his wife, You shall die of the cancer; you cannot be cured, and a surgical operation affording only temporary relief will result in useless expense. The husband had no power to withhold from his wife the

medical assistance which her case might require: *Harris v. Lee*, 1 P. Wms. 482; *Mayhew v. Thayer*, 8 Gray, 172.

As was said by the supreme court of Michigan in the recent case of *Carsten v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606: "It would be a cruel rule for her, if she cannot, in his absence, at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessities, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons, and when the occasion is pressing, it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them. It seems to us that no sensible line can be drawn between contracts for food and clothing and contracts for medical aid."

The consent of the wife, not that of the husband, was necessary. The professional men whom she had called in and consulted, being possessed of skill and scientific knowledge, were the proper persons to determine what ought to be done. They could not of course compel her to submit to an operation, but if she voluntarily submitted to its performance, her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof. The court below was therefore right in rejecting the first and third prayers of the plaintiffs, which place the burden of proof in regard to consent on the defendants. If the plaintiff alleges that there was no consent, he must establish his affirmation by proof. The party who allows a surgical operation to be performed is presumed to have employed the surgeon for that particular purpose: *Gladwell v. Steggall*, 5 Bing. 738.

It was the duty of the professional men to exercise ordinary care and skill, and this being a duty imposed by law, it will be presumed that the operation was carefully and skillfully performed, in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed, but must be affirmatively proved: *Best on Presumptions*, 68; *Jacksonville Street R'y Co. v. Chappell*, 21 Fla. 175.

This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged

unskillful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill: *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; *Baird v. Morford*, 29 Iowa, 531.

The court below committed no error in determining that it was incumbent on the plaintiff to prove affirmatively that the operation was performed without the consent of the patient, and also that her death was caused by unskillful and careless treatment of the physicians. Nor did the court commit any error in granting the defendants' second prayer, which enunciates the proposition that if death was caused by tubercular meningitis or other disease not produced by the operation, the defendants are not liable. The defendants' fourth prayer is also correct, and was properly granted. In it the jury are told that even if the disease resulting in death was caused by the operation, the defendants are not liable, if they performed said operation with the patient's consent in a careful and skillful manner, and under the belief that said operation was proper to be performed. In the defendants' third prayer the jury are told that the degree of care and skill required is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients, and that the burden of proof is on the plaintiffs to establish the want of such skill and care in the performance of the operation and attendance on the deceased while under treatment. There was no error in granting this instruction. It is proper to add that there was no evidence in the cause to sustain the plaintiff's case as stated in the first count of his declaration.

Finding no error in any of the rulings of the court below, its judgment must be affirmed.

PHYSICIANS AND SURGEONS—CARE AND SKILL REQUIRED OF: See note to *Holtzman v. Hoy*, 59 Am. Rep. 392-394. Physicians and surgeons must exercise such skill and care as is usually possessed and exercised by physicians and surgeons in good standing of the same school of practice in the locality of their practices: *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900, and note; compare *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606; extended note to *Howard v. Grover*, 48 Am. Dec. 481-487. A physician who examines a patient's womb with an instrument commonly used for that purpose, and, without evil intent or culpable negligence, inflicts a wound, which causes death, is not guilty of murder, nor even of manslaughter: *State v. Reynolds*, 42 Kan. 321.

ATTRILL v. HUNTINGTON.

[70 MARYLAND, 191.]

NO STATE WILL ENFORCE PENALTIES IMPOSED BY LAWS OF OTHER STATES.

Where, therefore, a statute of New York provides that "if any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," the liability imposed by this statute, being a penalty, cannot be enforced in Maryland, nor can an action be maintained in Maryland upon a judgment for such penalty recovered in the state of New York.

MARYLAND STATUTE OF LIMITATIONS MAY BE PLEADED IN BAR to the recovery in Maryland, against a stockholder of a corporation of New York, for a debt of the corporation for which he is made liable by the laws of New York, and this defense may be interposed by demurrer.

BILL in equity. The opinion states the case.

William A. Fisher and S. Teackle Wallis, for the appellant.

Hugh L. Bond, Jr., and John K. Cowen, for the appellee.

BRYAN, J. Collis P. Huntington filed a bill in equity to set aside certain transfers of stock made by Henry Y. Attrill. They were made to himself as trustee for his wife and daughters. The present appeal involves the stock transferred for the benefit of Elizabeth Attrill, the appellant, who is one of his daughters. It is alleged in the bill of complaint that Attrill made these transfers of stock without valuable consideration, and with intent to delay, hinder, and defraud his creditors, and especially the complainant, who is alleged to be a creditor. The bill is filed by the complainant in his own behalf to procure the payment of his own debt. No other creditor has been made a party to the suit, and no claims against this stock are presented for adjudication, except those asserted by the complainant, in his own interest. The bill shows that the complainant, in June, 1886, recovered against Attrill and one Soutter a judgment for nearly a hundred thousand dollars in the supreme court of New York for the county of Kings. And it is alleged that the cause of action on which the judgment was rendered arose in June, 1880, and was in this wise: That a certain corporation had been formed under the laws of New York, entitled the Rockaway Beach Improvement Company, Limited, of which the said Attrill was an incorporator and director; that the complainant loaned the said corporation one hundred thousand dollars, to be repaid on demand; that only nine hundred and thirty-two

dollars of this sum had been repaid; that the amount of the capital stock of the corporation was seven hundred thousand dollars; that Attrill, as director of the corporation, signed and verified by his oath a certain certificate under the statutes of New York, stating that the full amount of the capital stock of the corporation, to wit, the sum of seven hundred thousand dollars, had been paid in; that said Attrill, when he signed and swore to said certificate, knew that it was false, and that the law of New York made Attrill liable to pay the debts of the corporation by reason of his making under oath said false certificate. An exemplification of the judgment was filed with the bill of complaint. It showed that judgment was demanded and obtained against Attrill and Soutter, on the ground that they had made the false certificate under oath. We were informed at the argument that, by agreement of counsel, the New York statute was to be considered as set forth in the bill. A demurrer was filed by the defendant, which was overruled by the court below.

The twenty-first section of the statute is in these words: "If any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof": Act of 1875, c. 611 (New York). For doing any of these forbidden acts, the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived, and induced by deception to lend his money, or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay; nor is the recovery limited to the amount of the loss sustained. All that is necessary to show is, that the act has been committed, and thereupon any creditor is entitled to recover the full amount of his debt. In an action for an injury to the person or property of an individual, it must be first shown that his rights have been invaded, and then the extent of the damage must be shown. It is true that in some cases the law allows a recovery far beyond the amount of actual damage; as where the injury was inflicted from fraudulent or malicious motives. But in these cases the recovery is founded on the injury to rights of person or property, and the circumstances which justify an exceptional measure of damages must be proved in evidence. There is a very marked and obvious difference between these cases

and a case where a statute enacts that because of the commission of a certain act, without reference to any other circumstance, a party shall incur a liability. Because thou hast done this thing, thou shalt pay the debts of another. It is extremely difficult to conceive that the statute was not intended to provide a punishment for the obnoxious acts. The payment of a sum of money, which a party would not otherwise be obliged to pay, is no less a punishment because it is inflicted through the medium of a civil suit instead of criminal prosecution. And such has been the uniform opinion of the courts of the state where this statute was enacted. In *Merchants' Bank v. Bliss*, 35 N. Y. 412, an action was brought against the defendants, as trustees of a corporation created under the general act of 1848, to recover a debt due to the plaintiffs from the corporation; and the question was, whether the action was barred by limitations. The code prescribed six years as the period of limitations, where the action was upon a liability created by statute other than a penalty or forfeiture; and three years for "an action upon a statute for a penalty or forfeiture, where action is given to the party aggrieved." The defendants were alleged to be liable under the twelfth and thirteenth sections of the act. The twelfth section required every corporation organized under the act to make a report annually, within twenty days from the 1st of January, stating the amount of capital, and the proportion actually paid in, and the amount of existing debts; and provided that "if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." The thirteenth section enacted that "if the trustees of any such company shall declare and pay any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall thereafter be contracted while they shall respectively continue in office."

We will quote somewhat freely from the opinion of the court: "Under these sections, the trustees are declared to be jointly and severally liable for all the debts of the company in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but

upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severely punitive, inflicted on grounds of public policy, for the protection of creditors, and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute; there never was any such remedy, or cause of action, in whole or in part, at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 13 of the general act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained. But those elements have nothing to do with the actions given by these sections. Nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of those sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place. The right of action is given to the creditors, and they must be held to be the parties aggrieved. For these reasons, I am satisfied that the sections 12 and 13 impose a penalty, or a disability in that nature, to which the shorter limitation of three years applies." In *Stokes v. Stickney*, 96 N. Y. 323, this decision was fully approved. Referring to what was said in reference to the twelfth section, the court said: "Since that decision, the subject of actions under that section of the statute has frequently been under the consideration of this court, with the uniform conclusion that the actions therein provided for are penal in their character, and are not in any respect based upon the theory of affording compensation to the injured party for damages sustained by reason of the omission complained of"; and they quote a number of decisions of their own court. In this state, in construing a similar provision in a statute, it was held "that the liability of the director was not one arising upon contract, but one imposed upon him by the statute as a wrong-doer, and therefore in the nature of a penalty": *First National Bank of Plymouth*

v. *Price*, 33 Md. 498; 3 Am. Rep. 204. Section 10 of the New York act of 1848 makes the stockholders of every company incorporated under its provisions individually liable to the creditors of the company in a sum equal to the amount of their stock, until the whole of the capital stock is paid in, and a certificate thereof is made and recorded. A distinction is well established by the decisions between this liability and that imposed by the twelfth section of the act. In the former case, the statute withdraws from the stockholders the protection of the corporate character, and leaves them liable as co-partners to the amount of their stock; in the latter case, the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty: *Wiles v. Suydam*, 64 N. Y. 176. The distinction is mentioned in the *Plymouth Bank* case, *supra*, and many cases are there cited which maintain it. It is also approved by the supreme court of the United States in *Flash v. Conn*, 109 U. S. 371, and *Chase v. Curtis*, 113 Id. 452, and in *Norris v. Wrenschall*, 34 Md. 492; but in this last case all the reasoning and illustrations of the New York cases are not adopted.

We think that we must hold that the liability imposed by the twenty-first section of the New York act of 1875 is a penalty. If this be so, it cannot be enforced in this state. Upon this point the authorities agree with great harmony. In the case of the *Plymouth bank* this court said: "It is well settled that no state will enforce penalties imposed by the laws of other states; such laws are universally considered as having no extraterritorial operation." The same doctrine has recently been declared by the supreme court of the United States: *Flash v. Conn*, 109 U. S. 376; *Wisconsin v. Pelican Ins. Co.*, 127 Id. 290. We must, however, notice the fact that a judgment has been obtained for this penalty. A judgment merges the original cause of action, so that a suit cannot be again maintained upon it; it is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings. In the classification of legal subjects, it is called a debt of record, because of the obligation to pay it, which is imposed on the party against whom it is rendered. But the nature of a transaction is not changed by the reduction of it to a judgment. If we could suppose that a judgment was obtained on a contract to commit murder, would any one maintain that the judgment had removed the turpitude of the contract? Or that the law would mitigate its condemnation

of a grievous crime because of a change in the form with which it was clothed? It is unnecessary to pursue this subject, because the supreme court of the United States has recently decided the question here presented. In *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 292, 293, a suit was brought on a judgment for a penalty, and it was decided that the judgment in its "essential nature and real foundation" was the same as the original cause of action, and that a suit could not be maintained upon it beyond the limits of the state in which it was rendered.

It is alleged in the bill of complaint that the above-mentioned corporation was dissolved in March, 1882, by a judgment of a court in New York; that at the time of its dissolution it "was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the state of New York, all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date, and on the fourteenth day of April, 1882, as such stockholder, to the amount of three hundred and forty thousand dollars, the amount of stock held by him, and was on both said dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company, contracted between the twenty-sixth day of February, 1880, and the 29th of January, 1881; which debts aggregate to more than the whole value of the property owned by said Attrill." This liability is asserted to exist independently of the judgment. It cannot be maintained on the New York statute already mentioned, because by the twenty-fifth section a stockholder is not personally liable for a debt of the corporation, except in cases where an action to recover it has been brought against the corporation within two years after it became due; and here no such action has been brought. The judgment against Attrill for having made the false report certainly merges all right of action against him on this account. But let us assume that Attrill was liable at the times mentioned in this clause of the bill of complaint, and on the grounds therein stated. This liability is barred by the Maryland statute of limitations, and this defense properly arises under the demurrer filed in this case: *Belt v. Bowie*, 65 Md. 355.

Upon the whole, it appears to us that the complainant has no cause of action which he can maintain in this state.

Order reversed, and bill dismissed.

STONE, J., delivered a dissenting opinion, in which McSherry, J., concurred. He looked upon the principal point as a federal question, and was governed in his views more by his understanding of the decisions of the supreme court of the United States than by the decisions of the state courts. He conceded to the fullest extent the rule stated by Judge Marshall in the case of *The Antelope*, 10 Wheat. 123, that "the courts of no country execute the penal laws of another"; but still the question remains, What are the penal laws of a state? and does this case come properly within that rule?

The learned judge cited, discussed, and quoted from the case of *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, and said: "It will be readily seen from these extracts that the supreme court, in this opinion, so much relied on, does not extend the rule, that no country will execute the penal laws of another, beyond suits brought in the name of the state for the recovery of penalties for an infraction of its revenue or municipal laws, and was careful to state . . . that the cause of action was not any private injury, but solely the offense committed against the state." He next considered *Steam Engine Co. v. Hubbard*, 101 Id. 188, and *Chase v. Curtis*, 113 Id. 452. He thought that in these cases, and in the case of *Wisconsin v. Pelican Ins. Co.*, 127 Id. 265, the supreme court has given us a rule by which we can determine what cases come within the rule that no country will execute the penal laws of another. The rule covers crimes and misdemeanors, and actions brought by the state for an infraction of its laws. But where the state law gives an individual the right to recover damages or claims for the non-observance by other individuals or corporations of its laws, such infractions do not come within the rule. In answer to the argument that the case of *First National Bank of Plymouth v. Price*, 38 Md. 498, is decisive of this case, he said he thought the determination in that case was correct, although he thought the reasons assigned are not in accord with the decisions of the supreme court. The decision in the Price case was, he thought, correct, because no state is bound, by the rules of comity or convenience, to try cases *ex delicto* arising under purely local statutes of another state, and unknown to the common law. He thought the supreme court in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, meant to confine the rule, that no country will execute the penal laws of another, to such laws as are properly classed as criminal. It is not, he said, very easy to give any brief definition of a criminal law. It may, perhaps, be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and of which the state alone can take cognizance, are in their nature criminal, and come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its non-performance are not criminal. If all the laws of the latter description are held penal, in the sense of criminal, that clause in the constitution which relates to records and judgments is of comparatively little value. There is, he said, a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for injury to stock where railroads have neglected the state laws requiring them to fence in their tracks, and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute. He could not think that judgments on such claims are not within the protection given by the constitution of the United States.

ACTION IN ONE STATE TO ENFORCE CAUSE OF ACTION CREATED BY STATUTE OF ANOTHER STATE — It is a universally accepted rule of law that

the courts of no country or state will execute the penal or criminal laws of another state or country. Such laws are strictly local, and affect nothing more than they can reach: *Story's Conflict of Laws*, 8th ed., sec. 620; *The Antelope*, 10 Wheat. 66, 123; *Flash v. Conn*, 109 U. S. 371; *Wisconsin v. Pelican Ins. Co.*, 127 Id. 290; *Sherman v. Gassett*, 4 Gilm. 521; *Barnes v. Whitaker*, 22 Ill. 606; *Derrickson v. Smith*, 27 N. J. L. 166; *Scoville v. Canfield*, 14 Johns. 338; 7 Am. Dec. 467; *Teall v. Felton*, 1 N. Y. 537; *Delafield v. State*, 2 Hill, 159; *Western T. & C. Co. v. Kilderhouse*, 87 Id. 430; *State v. John*, 5 Ohio, 217; *Rorer on Interstate Law*, 148; *Dickson v. Dickson's Heirs*, 1 Yerg. 110; 24 Am. Dec. 444. This rule is not confined to laws for the punishment of crimes, but extends as well to statutes which impose penalties for the neglect or failure to perform certain duties or obligations imposed by law: *Louisiana v. Mayor of New Orleans*, 109 U. S. 285; *Flash v. Conn*, 109 Id. 376; *Wisconsin v. Pelican Ins. Co.*, 127 Id. 290; *Missouri River Tel. Co. v. First National Bank of Sioux City*, 74 Ill. 217; *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526; 46 Am. Rep. 175; *State of Indiana v. Helmer*, 21 Iowa, 370; *Tanner v. Allen*, Lit. Sel. Cas. 25; *Lindsay v. Hill*, 66 Me. 212; 22 Am. Rep. 564; *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157; *O'Reilly v. New York etc. R. R. Co.*, Sup. Ct. R. I., May, 1889; *Pickering v. Fisk*, 6 Vt. 102; *Suffolk Bank v. Kidder*, 12 Id. 464; 36 Am. Dec. 354; *Stack v. Gibbs*, 14 Vt. 357; *Graham v. Monsergh*, 22 Id. 543; *Judge of Probate v. Hibbard*, 44 Id. 597; 8 Am. Rep. 396; *Bowman v. Miller*, 25 Gratt. 331; 18 Am. Rep. 686. Thus it was held in *Missouri River Tel. Co. v. First National Bank of Sioux City*, *supra*, that the courts of Illinois cannot entertain jurisdiction of a suit against a national bank in Iowa for receiving interest above the rate allowed by the laws of the United States. In *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175, it was held that a statute of Indiana imposing a penalty upon telegraph companies for neglect of duty could have no force beyond the territorial limits of the state by which it was enacted, and could not apply to acts done in Illinois. In delivering the opinion of the court in that case, Elliott, J., said: "It is to be observed that we are not dealing with an action for a breach of contract, nor with a civil action for damages resulting from a tort, but are concerned solely with a proceeding to recover a purely statutory penalty. It is well known that very different rules apply to actions for the vindication of rights recognized by the common law from those prevailing in cases where recovery of a statutory penalty is sought." In *Lindsay v. Hill*, 66 Me. 212, 22 Am. Rep. 564, it was held that a law of New Brunswick imposing a penalty for charging usurious interest had no force in Maine, where the rate of interest is not limited. See also *Gale v. Eastman*, 7 Met. 14; *Bowman v. Miller*, 25 Gratt. 331; 18 Am. Rep. 686. Statutes prescribing proceedings for affiliating bastard children and compelling their fathers to support them are merely local police regulations, and cannot be enforced beyond the jurisdiction of the state by which they are enacted. *State of Indiana v. Helmer*, 21 Iowa, 370; *Tanner v. Allen*, Lit. Sel. Cas. 25; *Graham v. Monsergh*, 22 Vt. 543. A court of one state will not take cognizance of an official bond executed in another state, for the purpose of enforcing it in a peculiar manner directed by statute of such other state, but unknown to the common law: *Pickering v. Fisk*, 7 Vt. 102; *Judge of Probate v. Hibbard*, 44 Id. 597; 8 Am. Rep. 396.

And since the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to

which a judgment is presented for affirmative action from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it, if a judgment be obtained in the state whose statute imposes such a penalty, an action on this judgment cannot be maintained in the courts of another state: *Louisiana v. Mayor of New Orleans*, 109 U. S. 285; *Wisconsin v. Pelican Ins. Co.*, 127 Id. 265; disapproving the following cases, in which a contrary doctrine was applied: *State of Indiana v. Helmer*, 21 Iowa, 370; *Healy v. Root*, 11 Pick. 369; *Spencer v. Brockway*, 1 Ohio, 259; 13 Am. Dec. 615.

LIABILITY IN NATURE OF PENALTY. — It is admitted on all sides that when a liability imposed by the statute of a state is in its nature a penalty, such liability cannot be enforced beyond the limits of the state by which the statute was enacted. The difficulty is in determining what liabilities are in their nature penalties. A liability imposed by statute upon a certain class of persons, as, for instance, the officers or stockholders of a corporation, which is made dependent upon the contingency of their failing to perform some duty required by the statute, is in the nature of a penalty, and cannot be enforced beyond the jurisdiction of the state: *First National Bank of Plymouth v. Price*, 33 Md. 487; 3 Am. Rep. 204; *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157; *Derrickson v. Smith*, 27 N. J. L. 166; *Garrison v. Howe*, 17 N. Y. 458; *Merchants' Bank v. Bliss*, 35 Id. 412; *Harrisburg Bank v. Commonwealth*, 26 Pa. St. 451; *Woods v. Wicks*, 7 Lea, 40; *Bingham v. Clafin*, 7 Bank. Reg. 412, 419; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. In *First National Bank of Plymouth v. Price*, 33 Md. 487, 3 Am. Rep. 204, a statute of Pennsylvania provided that the total amount of the debts and liabilities of certain corporations should never exceed the amount of their capital stock actually paid in; and if any debts or liabilities should be contracted exceeding said amount, the directors and officers contracting the same, or assenting thereto, should be jointly and severally liable in their individual capacities for the whole amount of such excess, and the same might be recovered by an action of debt. The liability imposed by this statute was held to be in the nature of a penalty, which could not be enforced outside of Pennsylvania. Bartol, C. J., in delivering the opinion of the court in that case, said: "This liability does not arise upon any contract to which the directors are parties, but is altogether statutory, imposed on them as wrongdoers, and in its nature penal, and, as such, can only be enforced within the state where the statute operates." In *Halsey v. McLean*, 12 Allen, 438, 90 Am. Dec. 157, a statute of New York provided that the stockholders and officers of a corporation should be personally liable for all the debts of the corporation, unless they made and published annually a report stating the amount of its capital, the proportion paid in, and the amount of all its existing debts. In an action against the stockholders and officers brought by a creditor in Massachusetts, it was held that the liability created by the statute was in the nature of a penalty, and that the action could not be maintained. In *Derrickson v. Smith*, 27 N. J. L. 166, a statute of New York provided that certain corporations should publish annually the condition of their affairs, and on their failure to do so, all their trustees were to be jointly and severally liable for all the debts then existing, and for all that should be contracted before such report was made. It was held that an action to recover against a trustee of the corporation could not be maintained in New Jersey. Green, C. J., delivering the opinion of the court in that case, said: "It is, in fact, a penalty inflicted upon the trustees for a failure to perform a duty enjoined by the statute." In *Wisconsin v. Pelican Ins.*

Co., 127 U. S. 265, a statute of Wisconsin required every foreign insurance company doing business in the state to deposit, in the month of January of each year, in the office of the insurance commissioner, a statement of the business of the company, and for failure to do so, it should forfeit the sum of five hundred dollars a month for every month it should continue to do business after such failure. This liability was held to be a penalty. In *O'Reilly v. New York etc. R. R. Co.*, Sup. Ct. R. I., May, 1889, a statute of Massachusetts provided that damages for wrongfully causing the death of a person were "to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents," and to the amount of at least five hundred dollars. It was held that this legislation was penal, and although the Rhode Island statute gave a right of action in such cases, yet, as it lacked these penal features, an action could not be maintained in that state for an injury inflicted in Massachusetts. But where a statute or act of incorporation declares that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not founded upon the statute, and a suit against the stockholders to charge them individually with the debts contracted by the corporation, pursuant to a provision in the act of incorporation, is not an action upon the statute for a forfeiture. In such cases, the stockholders are liable in an original and primary sense, like partners, or members of an unincorporated association, and their liability is not created by the statute of incorporation. If, therefore, such liability is not opposed to the legislation or public policy of the state in which it is sought to be enforced, its courts will enforce it: *Flash v. Conn.*, 109 U. S. 371; *Corning v. McCullough*, 1 N. Y. 47; 49 Am. Dec. 287; *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685; *Harger v. McCullough*, 2 Denio, 119; *Moss v. Oakley*, 2 Hill, 265; *Bailey v. Bancker*, 3 Id. 188; 38 Am. Dec. 625; *Moss v. McCullough*, 5 Hill, 131; *Ex parte Van Riper*, 20 Wend. 614; *Woods v. Wicks*, 7 Lea, 40. In determining the question whether or not a liability imposed by a statute is in its nature penal, the construction of the statute by the courts of the state in which it was enacted is generally considered to be conclusive: *Flash v. Conn.*, 109 U. S. 371; *First National Bank of Plymouth v. Price*, 33 Md. 487; 3 Am. Rep. 204; *Halsey v. McLean*, 12 Allen, 439; 90 Am. Dec. 157.

ACTION FOR WRONGFUL ACT CAUSING DEATH IN ANOTHER STATE. — On the question of the right to maintain an action in one state to recover damages for injuries causing the death of a person in another state, the authorities are not uniform. The supreme court of the United States in the case of *Dennick v. Central R. R. Co.*, 103 U. S. 11, lays down the broad rule that such actions are transitory, and that when the right of action has become fixed and a liability has been incurred in the state where the transaction occurred, such right of action may be pursued and such liability may be enforced in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. In that case the plaintiff, as administrator, brought suit in the state of New York to recover damages for the death of his intestate by an accident on the defendant's road in New Jersey. It was contended that the action was not maintainable, because the courts of New Jersey alone had jurisdiction of the cause, but the court held that the action would lie. Mr. Justice Miller, delivering the opinion of the court, said: "Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of the parties. . . . If the liability to pay money was fixed by the

law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law, and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred." The great weight of recent authority sustains the doctrine of *Dennick v. Central R. R. Co.*, *supra*, with this qualification, that the statute of the state under which the cause of action arose is not inconsistent with the statute or the public policy of the state in which the right of action is sought to be enforced: *South Carolina R. R. Co. v. Nix*, 68 Ga. 572; *Shedd v. Moran*, 10 Ill. App. 618; *Burns v. Grand Rapids & I. R. R. Co.*, 113 Ind. 169; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Id. 439; 10 Am. St. Rep. 67; *Boyce v. Wabash etc. R'y Co.*, 63 Iowa, 70; 5 Am. Rep. 730; *Morris v. Chicago etc. R'y Co.*, 65 Iowa, 727; 54 Am. Rep. 39; *Herrick v. Minneapolis etc. R'y Co.*, 31 Minn. 11; 47 Am. Rep. 771; *Chicago etc. R'y Co. v. Doyle*, 60 Miss. 977; *Illinois Cent. R. R. Co. v. Crudup*, 63 Id. 291; *Stoeckman v. Terre Haute etc. R. R. Co.*, 15 Mo. App. 503; *Missouri Pacific R'y Co. v. Lewis*, 24 Neb. 848; *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; 38 Am. Rep. 491; *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250; 56 Am. Rep. 200; *N. & C. R. R. Co. v. Sprayberry*, 8 Baxt. 341; Story's Conflict of Laws, 8th ed., sec. 625, note a. And in *Herrick v. Minneapolis etc. R'y Co.*, 31 Minn. 11, 47 Am. Rep. 771, it was even held that a cause of action accruing in Iowa under a statute rendering railway corporations liable to their employees for injuries by the negligence of their co-employees in the operation of their roads might be enforced in Minnesota, although there was no corresponding statute there. And in *Illinois Cent. R. R. Co. v. Crudup*, 63 Miss. 291, it was held that an administrator might maintain an action in Mississippi for the wrongful killing of his intestate in Tennessee, even though he could not have sued in Mississippi had the wrongful act occurred there. Nor is it necessary that the statutes of both states shall be precisely alike. It is sufficient if they are substantially similar: *Morris v. Chicago etc. R'y Co.*, 65 Iowa, 727; 54 Am. Rep. 39; *Burns v. Grand Rapids & I. R. R. Co.*, 113 Ind. 169; *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; 38 Am. Rep. 491.

The following cases are opposed to the doctrine of *Dennick v. Railroad Co.*, 103 U. S. 11: *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46; 26 Am. Rep. 742; *Richardson v. New York Central R. R. Co.*, 98 Mass. 85; *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Hover v. Pennsylvania Co.*, 25 Id. 667. In *McCarthy v. Chicago etc. R. R. Co.*, *supra*, it was decided that under a statute of Kansas conferring a right of action for damages for death caused by a wrongful act, no action could be maintained where the death, although occurring in Kansas, was caused by injuries inflicted in another state.

PROOF OF LAW OF STATE WHERE CAUSE OF ACTION AROSE. — In an action to recover damages for the wrongful killing of a person in another state, it is generally held to be necessary to prove that such a right of action is given by the law of the state where the occurrence took place: *Selma etc. R. R. Co. v. Lacy*, 43 Ga. 461; *Hamilton v. Hannibal etc. R. R. Co.*, 39 Kan. 56; *Hyde v. Wabash etc. R'y Co.*, 61 Iowa, 441; 47 Am. Rep. 820; *State v. Pittsburgh etc. R. R. Co.*, 45 Md. 41; *Debevoise v. New York etc. R. R. Co.*, 98 N. Y. 377; 50 Am. Rep. 683; *Nashville etc. R. R. Co. v. Hakin*, 6 Cold. 582; *Needham v. Grand Trunk R'y Co.*, 38 Vt. 294. There is no presumption that the statute law of one state is the same as that of another: *Murphy v. Collins*, 121 Mass. 6. If there is no law giving a right of action in the place where the wrongful act was committed, no action can be maintained in an-

other state, although the law of the latter state gives such right of action: *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400; *Davis v. New York & N. E. R. R. Co.*, 143 Mass. 301; 58 Am. Rep. 138; *Willis v. Missouri Pacific R'y Co.*, 61 Tex. 432; 48 Am. Rep. 301. And the following cases hold that where the law of the state in which the wrongful act was committed gives a right of action, but the law of the state where the remedy is sought does not give such right, no action can be maintained: *Taylor's Adm'r v. Pennsylvania Co.*, 78 Ky. 348; 39 Am. Rep. 244; *Vauster v. Missouri Pacific R'y Co.*, 84 Mo. 679; 54 Am. Rep. 105; *Texas and Pacific R'y Co. v. Richards*, 68 Tex. 375; *St. Louis etc. R'y Co. v. McCormick*, 71 Id. 660; *Anderson v. Milwaukee etc. R'y Co.*, 37 Wis. 321; *Bettys v. Milwaukee etc. R'y Co.*, 37 Id. 323.

In *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 206, it was held that where the statute of Pennsylvania gave the right to the widow, etc., of the deceased, and the New Jersey statute gave the right to the personal representative, for the exclusive benefit of the widow and next of kin, the widow could not sue in Pennsylvania in her own name. In *St. Joseph etc. Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9, it was held that one may maintain an action for damages in Missouri against a county commissioner of Kansas for refusing to obey a *mandamus* to levy a tax to pay a judgment against the county, because this was not seeking to enforce a merely statutory right, but one maintainable at common law

FLETCHER v. PULLEN.

[70 MARYLAND, 205.]

PARTNER, LIABILITY OF PERSON WHO HAS HELD HIMSELF OUT AS. — The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief; and it must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop-bills, signs, or cards, and from various other acts, from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent; and whether a party has so held himself out, or permitted it to be done, is, in every case, a question of fact, and not of law.

EVIDENCE THAT PLAINTIFF BELIEVED DEFENDANT TO HAVE BEEN PARTNER, ADMISSIBILITY OF. — In an action against a party seeking to charge him as partner of another person, letters, circulars, and envelopes written and gotten up by the latter, without the knowledge or consent of the defendant, are admissible in evidence as a link in the plaintiff's case, for the purpose of showing that he believed, and had good reason to believe, that the defendant was a partner, and that he trusted the supposed firm upon the faith of his responsibility.

JURY MAY INFER THAT PERSON WAS HELD OUT TO PUBLIC AS PARTNER with his knowledge and consent from the fact that he knew that his name was signed with that of the other person to an advertisement calling attention to their business, and soliciting from the public a continuance of confidence and orders, and did not insert in the newspapers in which such advertisements were published any denial of the partnership, and evidence of this fact is admissible, though the party dealing with the supposed firm never saw the advertisements, where it has been shown that he had trusted the firm in good faith and upon good grounds.

PERSON KNOWING THAT HE IS HELD OUT AS PARTNER IS CHARGEABLE as one, unless he does all that a reasonable and honest man should do under similar circumstances to assert and manifest his refusal, and thereby prevent innocent parties from being misled, and whether or not he has done this is a question for the jury to determine.

PARTY SOUGHT TO BE CHARGED AS PARTNER OF ANOTHER MAY PROVE, in defense of an action brought to charge him as such, that he refused to pay for advertisements of the alleged partnership, on the ground that he was not a partner; that he returned to the postmaster unopened mail matter addressed to such firm, stating that he had nothing to do with such other person's business, and was not his partner, and that he had successfully resisted a suit which had been brought against him as partner of such person. And he may also introduce in evidence a lease between him and such other person, to show that by its true construction it merely created the relation of landlord and tenant between them, and not that of actual partnership.

ACTION for goods sold and delivered. The lease to which reference is made in the opinion is as follows: "This is to certify that I have let and rented unto R. W. Bramble, the part of the East Cambridge farm lying southeast of the railroad, and the hedge south of the apple and pear orchard, containing about fifteen acres of land, for the term of six years, beginning on the first day of January, 1881, and ending on the first day of January, 1887, and furnish with said land a dwelling-house with four good rooms, with stable, and place for cart and other purposes; the said land to be used for small fruit, vegetables, and raising fruit-trees; the said R. W. Bramble to furnish all plants, manures, and do or have done all planting, cultivating, picking, packing, hauling, and shipping, or whatsoever there is to be done; to deliver all produce raised, in good merchantable order, at the usual places for shipment; or if sold at home, to deliver where sold at his expense, and pay unto W. M. Fletcher one half of all the money received for all the produce raised, after deducting out of said amount expenses for crates, boxes, freights, and commissions, or each paying half of said expenses for boxes, crates, freight, and commission; and the said R. W. Bramble to make punc-

tual payments of the rent in the manner aforesaid, cultivate and keep the premises in good order, and quit and surrender the premises at the expiration of said term in as good state and condition as reasonable use and wear will permit, damages by fire excepted. Witness our hands and seals this fourth day of September, 1880.

“W. M. FLETCHER. [SEAL.]

“R. W. BRAMBLE. [SEAL.]

“Test: M. B. CORSEY.”

Other facts are stated in the opinion.

Sewell T. Milbourn, for the appellant

Daniel M. Henry, for the appellees.

MILLER, J. The plaintiffs, who are nurserymen in Milford, Delaware, sued Bramble and Fletcher, as partners, in the same business, at Cambridge, in this state, for fruit-trees sold and delivered to them in the autumn of 1886. Bramble died before the trial, and Fletcher defended upon the ground that he was not a partner. The exceptions relate mainly to the admissibility of evidence upon the question, not whether Fletcher and Bramble were actually partners *inter sese*, but whether Fletcher had held himself out, or had permitted himself to be held out, as a partner, so as to become responsible to third parties.

The law on this subject, well established by authority, may be stated thus: The ground of liability of a person as partner who is not so in fact is, that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop-bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent. And whether a defendant has so sold himself out, or permitted it to be done, is in every case a question of fact, and not of

law: *Thomas v. Green*, 30 Md. 1; 1 Lindley on Partnership, 45; *Thompson v. First National Bank*, 111 U. S. 586, 587; 5 Wait's Actions and Defenses, 118, 114. These general rules apply to the present case.

The evidence shows that there was in or near Cambridge a fruit-farm and nursery on about fifteen acres of Fletcher's land, which Bramble had occupied and managed from the year 1881 to 1887. The plaintiffs then proved that in October and November, 1886, they received several letters, postal-cards, telegrams, and circulars from Cambridge, signed "Fletcher and Bramble," representing them to be partners, and the envelopes in which the letters were inclosed were stamped with the same firm name. These letters contained orders for fruit-trees, and the first of them gave a reference to a Mr. Van Horst, formerly of Milford, but then residing in Cambridge. The plaintiffs, not knowing the firm, nor by whom the letters were written, wrote to Van Horst and others, inquiring as to its credit and standing, and in reply received information to the effect that Fletcher was entirely responsible, but that Bramble was worth nothing. Upon this information, and receiving no intimation that Fletcher was not a partner, they filled the orders and delivered the trees, relying upon his credit. Each item of this testimony was excepted to as it was offered, upon the ground that these letters, circulars, and envelopes were written and gotten up by Bramble without Fletcher's knowledge or consent. We think, however, they were all admissible, not because the acts and declarations of Bramble would bind Fletcher, as of course they would not, unless he was an actual partner, but for the purpose of showing that the plaintiffs believed, and had good reason to believe, that he was a partner, and that they trusted the supposed firm upon the faith of his responsibility. To prove this was an important link in the plaintiffs' case, and evidence tending to prove it was, in our opinion, admissible.

The plaintiffs then proved that an advertisement signed "Fletcher and Bramble," calling attention to their nursery, offering their trees for sale, and soliciting from the public continuance of confidence and orders, was published in two weekly newspapers of Cambridge, where Fletcher lived for three months during the year 1884. In one of these papers there was also a local notice of the advertisement. These were also prepared, inserted, and paid for by Bramble without Fletcher's knowledge, but it was proved that during the

time of their publication he was a subscriber to both papers, and they were regularly sent to him. There is also clear proof that he actually knew of them while they were being published, and never inserted in either of the papers any denial of the partnership.

From all this, it was competent for a jury to infer that he was held out to the public by Bramble as a partner, with his knowledge and assent, and we are of opinion the plaintiffs were entitled to prove this, though they never saw the advertisements, and were not influenced by them in trusting the firm. They had already proved they had so trusted it in good faith, and upon good grounds, and we think they had the right to resort to these antecedent advertisements and to this proof for the purpose of showing that Fletcher had been so held out to the public with his knowledge and assent. It was evidence to go to the jury upon that subject, and if uncontradicted, would have made him a partner, at least as to all third parties who had trusted the firm in good faith upon that supposition. Having knowledge of these advertisements, it was his duty to deny the partnership if he wished to escape liability. But what was he to do, and how much? We do not say he was under a legal obligation to publish a repudiation of the partnership in the same newspapers, or in any other, though this would seem to be a very obvious and the most efficient mode of proclaiming such denial, and the fact that he failed to do so was a circumstance to go to the jury. But we take it that the rule upon this subject stated by a very eminent jurist is reasonable and just: "If one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled": *Parsons on Partnership*, 134.

It follows that the court below was right in admitting all the evidence offered by the plaintiffs, and in rejecting the defendant's first prayer. In regard to his second, third, and fourth prayers, all that need be said is, that the propositions they contain are all embraced in his fifth prayer, which the court granted, with a single modification, to which we see no valid objection.

We come now to the rulings excluding certain evidence offered by the defendant to show and sustain his denial and repudiation of the partnership. His own testimony was to the

effect that Bramble was simply his tenant of the land for the term of six years from 1881; that Bramble had a fruit-tree nursery on the land, but he himself had nothing to do with it, and never entered into a contract of partnership with Bramble, either written or verbal, in the nursery business or any other; that he never held himself out as such partner, and never lent his name or authorized the use of it by Bramble with reference to this business or any other; that he never knew of the letters, circulars, and envelopes written and used by Bramble until they were produced in court at the trial; that the advertisements and local notice were inserted without his knowledge or consent, and he never knew anything about them until they appeared in the papers; that he never put himself to the trouble and expense of publishing in these papers, or in any others, a contradiction of the advertisements, but had on all occasions, to town people and country people, when the subject was mentioned to him, and often when it was not, denied the existence of any partnership, and repudiated the advertisements as unauthorized by him. All this was allowed to go in without objection, but it is to be observed that he admits he knew of the advertisements which clearly and publicly proclaimed the partnership, and never published in any newspaper any denial of it. We have said he was under no legal obligation to make publication, but that it was his duty to do all that a reasonable and honest man should do, under similar circumstances, to manifest his denial. This is the important question in the case, and it was one solely for the jury to determine. On this issue of fact he was entitled to adduce all the evidence he could, leaving it for the jury to decide whether, upon the whole of it, they thought he had done all that a reasonable and honest man ought to have done. Under this rule, he was entitled to the benefit of any evidence in corroboration of his own testimony which tended to prove the publicity of his denial. Now, in addition to his own general evidence on this subject, he offered to prove:—

1. By the editor of one of the papers in which the advertisement and notice appeared, that when the witness called upon him to pay for the same, he refused to do so, repudiated all partnership with Bramble, declared he had nothing to do with Bramble's business, and would have nothing to do with his bills.

2. By the postmaster of Cambridge, that soon after the

publication of the advertisements, witness delivered to Fletcher certain mail matter addressed to "Fletcher and Bramble," but he returned it unopened, and refused to accept the same, telling witness he had nothing to do with Bramble's business, and was no partner of his.

3. That in July, 1885, he and Bramble were sued as partners by the steamboat company, before a magistrate in Cambridge, on a bill for freight; that there was a crowd at the trial, and he resisted the suit, and refused to pay the account, on the ground that he had nothing to do with Bramble's business; that the magistrate gave judgment in his favor, and the case was much discussed in the community, especially by the steamboat agent, who made great complaint because the magistrate had decided in his favor.

In our opinion, these items of evidence should have been admitted. It is not for this court to pass upon their weight or effect, no matter how slight or inadequate as a denial of the partnership publicly proclaimed in the newspapers we may deem them to be. This is a matter solely for the jury. Our duty is simply to determine the question of their admissibility as evidence, and we think the court erred in rejecting them.

We are also of opinion that the agreement, or lease as it is called, between Fletcher and Bramble, for the land upon which the nursery was carried on, should have been admitted. It was part of the defendant's case to prove that he was not an actual partner with Bramble. This agreement was admissible for that purpose, if he could show that by its true construction it merely created the relation of landlord and tenant between them.

The error in rejecting the items of evidence referred to requires us to reverse the judgment and award a new trial. But in view of the fact that the court below, acting as a jury, found for the plaintiffs, notwithstanding they had granted the defendant's fifth prayer, in which all his own testimony in denial of the partnership was expressly submitted to the consideration of the judges, we think each party should be required to pay his own costs, both in this court and in the court below.

Judgment reversed, each party to pay his own costs in this court and in the court below, and new trial awarded.

PARTNERSHIP — LIABILITY OF A PERSON HELD OUT AS A PARTNER. — One becomes liable as a partner to third persons when he is a partner in fact by a partnership compact between the partners; or when, although not in fact a partner, he holds himself out, or allows himself to be held out, to the

public as a partner: *Alabama Fertilizer Co. v. Reynolds*, 85 Ala. 19; for, where one holds himself out as a partner to the public, he is estopped to deny the relationship to the detriment of the rights of third parties: *Cirkel v. Crosswell*, 86 Minn. 323; *Brown v. Grant*, 39 Id. 404; *Huckaba v. Abbott*, 87 Ala. 409. So where two or more persons execute a written instrument as a copartnership, neither they themselves nor their personal representatives can dispute the existence of such copartnership: *Wise v. Williams*, 72 Cal. 544; for the acts and conduct of several persons may estop them from denying that they are partners: *Rogers v. Murray*, 110 N. Y. 658. So a partner who has actually retired from the firm may still be held liable as such to persons who have no notice of his withdrawal: *Lieb v. Craddock*, 87 Ky. 525; for a partnership, once established, is presumed to continue until dissolution thereof is proved: *Butler v. Henry*, 48 Ark. 551.

PARTNERSHIP — ONE NOT A PARTNER HOLDING HIMSELF OUT AS SUCH. — Whether one did hold himself out as a partner or not is a question of fact to be submitted to a jury: *Brown v. Watson*, 72 Tex. 216; and the jury may arrive at their determination of such a question from the surrounding facts and circumstances, including the declarations and conduct of the alleged partner, as well as from direct proof: *Brown v. Watson*, *supra*; *Rogers v. Murray*, 110 N. Y. 658; but the burden of proof is upon him who alleges the existence of the partnership: *Lieb v. Craddock*, 87 Ky. 526.

JONES v. STATE.

[70 MARYLAND, 323.]

ABORTION — EVIDENCE ADMISSIBLE ON TRIAL FOR PROCURING. — On a trial upon an indictment which charges that the defendant “did knowingly use and cause to be used certain means” for the purpose of unlawfully causing the miscarriage and abortion of a certain female, a letter written by him to her, containing instructions as to how she should take a bottle of ergot which he sent with it, and proof by her that she took the drug so sent to her by him, and in other respects also followed the instructions given by him, are admissible in evidence, although he was not present when she took the drug, and did the other things which he instructed her to do; and so, also, is a conversation between him and her, in which she told him, upon his charging her with not having complied with his instructions contained in his letters, that she had done so, but without producing the desired effect.

INDICTMENT for procuring abortion. The opinion states the case.

Isaac E. Pearson, for the appellant.

D. N. Henning, state's attorney for Carroll County, and *William Pinkney Whyte*, attorney-general, for the appellee.

McSHERRY, J. The appellant was indicted under section 2 of chapter 179 of the Acts of 1868, for that he “did knowingly use and cause to be used certain means” for the purpose of

unlawfully causing the miscarriage and abortion of one Margaret Oursler. There are two counts in the indictment, and they differ only in the averments respecting the means used to accomplish the criminal purpose. The two exceptions which were taken during the trial present substantially the same question. The state's attorney offered in evidence several letters written by the traverser to the girl Margaret Oursler, and then proved by her that, "in compliance with one of said letters," she administered to herself, out of the presence of the traverser, the drug sent to her by him, and in other respects also followed the instructions given by him. She further proved that afterwards the traverser said to her she had not complied with his advice as contained in the letters, to which she replied that she had done so, but without producing the desired effect. These letters and this conversation were objected to, and their admission in evidence forms the ground of the two exceptions. We cannot set out these letters, or even give the substance of some of them; their coarse indecency is shockingly vile. It is sufficient to say that, accompanying one of them, the traverser sent to the girl a bottle of ergot, with written instructions to take the drug at once, and with minute directions as to how it must be taken. At the same time he named what other means she should resort to. He now insists that as he was not actually present when she did take the drug, and did do the other things which he advised her to do, he cannot be convicted, and that this evidence should have been excluded. He insists, further, that his conduct amounted only to soliciting her to do the act herself. This is utterly untenable. He furnished her the drug, and urged and directed her to take it for the express purpose of producing an abortion; and she accordingly took it. This was knowingly using and causing to be used by him a means for the purpose of unlawfully causing a miscarriage and abortion, and is directly and distinctly within the words and intention of the statute. Any other conclusion would render the act of assembly entirely nugatory. The rulings of the circuit court were entirely correct.

The case of *Lamb v. State*, 66 Md. 285, has no application here. The second count of the indictment in that case, which was the only count before this court, and therefore the only one which was reviewed, was not framed under the act of 1868, and did not charge an offense punishable by it.

Finding no errors in the rulings excepted to, those rulings

are affirmed, and the cause will be remanded that the traverser may be sentenced.

ABORTION. — As to what evidence is admissible in criminal prosecutions for procuring abortions, see note to *Abrams v. Foshee*, 66 Am. Dec. 89-91; note to *State v. Moore*, 95 Id. 786, 787.

DAMBMANN v. RITTLER.

[70 MARYLAND, 330.]

OPTIONAL CONTRACT, DAMAGES RECOVERABLE FOR BREACH OF. — Where one party contracts to sell and deliver to another from three hundred to five hundred tons of phosphate during a certain month, and the latter agrees to give ample notice of his wants twenty-four hours ahead of the time specified for the delivery of each order, and three hundred tons are delivered under the contract, if the purchaser then notifies the seller that he will exercise his option to take the remaining two hundred tons, and requests the seller to deliver the same, but the latter refuses to do so, the buyer may recover damages in a court of law for breach of the contract.

ACTION to recover damages for breach of contract. The opinion states the case.

B. Howard Haman, for the appellants.

George Whitelock and Samuel D. Schmucker, for the appellees.

YELLOTT, J. A suit was instituted in the court below by the appellees against the appellants, the plaintiffs claiming damages for an alleged breach of contract. The contract is set forth in the declaration. The defendants demurred to the declaration, and the demurrer being overruled, and leave granted to plead over, a judgment was subsequently entered in favor of the plaintiffs. The record discloses the following facts: The appellants agreed to sell and deliver to the appellees, during the month of September, 1888, from three hundred to five hundred tons of acid phosphate. By the terms of the contract, the appellees were "to give ample notice of their wants twenty-four hours ahead of the time specified for delivery of each order"; and cash was to be paid on delivery. The phosphate was to be "filled into buyers' bags, and delivered to buyers' drays in sellers' factory." Three hundred tons were delivered and paid for in cash on delivery. The appellants then informed the appellees that they would decline to deliver any more. The appellees denied their right

so to decline, and on the 22d of September, 1888, notified the appellants that they would exercise their option to take the remaining two hundred tons, and requested the appellants to deliver the same. The appellants refused to deliver the remaining two hundred tons, and suit was brought by the appellees to recover damages for breach of the contract.

The only question really involved in controversy and presented for determination is, whether there was such a contract as can be enforced in a court of law. Three hundred tons of phosphate had been delivered by the defendants, and paid for by the plaintiffs. The defendants, by the terms of the contract, were to deliver, upon notice from the plaintiffs, additional quantities of phosphate, not exceeding two hundred tons in all. The plaintiffs had an option to make a demand for the delivery of the remaining two hundred tons of phosphate, or any portion of it. The plaintiffs were not bound to make a demand for delivery, but if they did so, the defendants had agreed to deliver the article. It seems to be a settled principle that an agreement may be so framed as to leave one party an option, and thus impose no obligation on the other party until the option is exercised so as to create an obligation: 2 Parsons on Contracts, 657; *Wolf v. Willits*, 35 Ill. 88; *Jenkins v. Green*, 27 Beav. 437.

In contracts of this nature, when one party has an option, and gives notice that he has exercised it, the effect of such notice is to impose on the other party a binding obligation enforceable in a court of law. Such is clearly the doctrine as expounded by Park, J., in *Chippendale v. Thurston*, 4 Car. & P. 101.

In *Wheeler v. New Brunswick and Canada R. R. Co.*, 115 U. S. 29, the court, adopting the language of Chief Justice Cockburn in a recent English case, said, in reference to a notice by a defendant of his intention not to perform his part of an executory contract, that "the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circum-

stances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

As this was the sole question involved in controversy, it is apparent that there was no error in the ruling of the court below, and its judgment should be affirmed.

OPTIONAL CONTRACTS. — An agreement, optional as to one party, and obligatory as to the other, is deemed a mutual contract, and may be enforced by the former: *Cherry v. Smith*, 3 Humph. 19; 39 Am. Dec. 150, and particularly note 152, 153, as to the law with respect to optional contracts generally.

STATE v. BLIZZARD.

[70 MARYLAND, 335.]

FALSE PRETENSES, SUFFICIENCY OF INDICTMENT FOR. — An indictment for false pretenses is not demurrable because it fails to set out the false pretenses intended to be relied upon; but the indictment, in other respects, must have that degree of certainty and precision that will fully inform the accused of the special character of the charge against which he is called upon to defend, that will enable the court to determine whether the facts alleged, upon the face of the indictment, are sufficient to constitute a crime, and that will protect him against further prosecution for the same alleged offense.

INDICTMENT MUST GIVE PURPORT OF INSTRUMENT ALLEGED TO HAVE BEEN OBTAINED BY FALSE PRETENSES, or some other proper designation thereof, so that there can be no mistake as to the identification of the instrument described with that produced in evidence in support of the indictment.

INDICTMENT FOR OBTAINING "BILL OF SALE OR MORTGAGE OF PERSONAL PROPERTY" BY FALSE PRETENSES, where it does not aver that the instrument was assigned or transferred to the accused by the owner, or that something more passed to the accused than the mere paper upon which the instrument was written.

INDICTMENT LACKS SUFFICIENT CERTAINTY AND PRECISION which describes the instruments alleged to have been obtained by false pretenses as certain valuable securities, to wit, the indorsement and signature to two certain promissory notes for the payment of three hundred dollars each. The offense contemplated by the statute is the obtaining by false pretenses of a subsisting security, and not merely the obtaining of a signature to an instrument.

OWNERSHIP OF PROPERTY OR SECURITIES MUST BE DISTINCTLY ALLEGED IN INDICTMENT for obtaining them by false pretenses. Such an averment is as necessary as in an indictment for larceny.

INDICTMENT. The opinion states the case.

David N. Henning, state's attorney for Carroll County, and William Pinkney Whyte, attorney-general, for the appellant.

James A. C. Bond, for the appellee.

ALVEY, C. J. The indictment in this case is for obtaining what are alleged to be valuable securities by false pretenses. It consists of a single count, wherein it is alleged that the defendant, "by certain false pretense by him then and there made to Richard Manning, unlawfully, knowingly, and designedly did obtain from Richard Manning a certain valuable security, to wit, a certain bill of sale or mortgage of personal property for the payment of six hundred dollars on condition, executed by one John Blizzard to Annie M. Blizzard and Samuel Blizzard; and certain other valuable securities, to wit, the indorsement and signature of the said Annie M. Blizzard to two certain promissory notes for the payment of three hundred dollars each, and the signature of Samuel M. Blizzard, her husband, with her, the said Annie M. Blizzard, to said promissory notes, with intent then and there to defraud; he, the said John W. Blizzard, then and there well knowing the said false pretenses to be false," etc.

The defendant demurred to the indictment, and the court sustained the demurrer, and discharged the defendant. The state filed a petition in error, and assigned as ground of error in the ruling of the court,—1. That the court erred in holding that the indictment did not sufficiently allege the offense of obtaining a valuable security under false pretenses, with intent to defraud, etc.; and 2. That the court erred in ruling the indictment defective in law because it was not sufficiently alleged therein that a valuable security had been obtained by the defendant by false pretenses, with intent to defraud, within the meaning of the statute. The two assignments of error being substantially the same, they may be considered together as a single assignment.

Formerly, before the Act of 1835, chapter 819, it was necessary that the false pretenses, by means of which the goods or money had been obtained, should be specifically set forth in the indictment, with the allegation of their falsity to the knowledge of the defendant, so that the court could determine

whether they came within the meaning of the statute. But the statute now provides (Code, art. 27, sec. 288) that "in any indictment for false pretenses, it shall not be necessary to state the particular false pretenses intended to be relied on in proof of the same; but the defendant, on application to the state's attorney before the trial, shall be entitled to the names of the witnesses and a statement of the false pretenses intended to be given in evidence." The present indictment, therefore, was not demurrable because it failed to set out the false pretenses intended to be relied on. It does not appear that any application had been made for a statement of such false pretenses, or that any such statement had been placed upon record.

But while there is no longer a necessity for specially alleging in the body of the indictment the particular false pretenses made use of by the defendant as means of perpetrating the fraud, the indictment, in other respects, must have that degree of certainty and precision that will fully inform the accused of the special character of the charge against which he is called upon to defend, and that will enable the court to determine whether the facts alleged upon the face of the indictment are sufficient, in the contemplation of law, to constitute a crime; and, whether the trial be followed by acquittal or conviction, that the record may stand as a protection against further prosecution for the same alleged offense. It is true, the legislature, to obviate some of the technical difficulties and refined distinctions that frequently arose in the trial of this class of cases, has provided, by the Act of 1862, chapter 80 (Code, art. 27, sec. 291), that, in indictments for obtaining property by false pretenses, and also in some other cases, it shall be sufficient to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person, and that, on the trial, it shall be sufficient to prove that the defendant did the act charged with an intent to defraud. And, by the same statute, it is also provided that, in indictments for obtaining by false pretenses any instrument, "it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out a copy or *fac-simile* thereof, or otherwise describing the same." These provisions, however, only relate to the manner of alleging the facts, and bringing them upon the record, but do not dispense with the necessity

of their averment in the indictment as essential to the proper description of the crime charged. The purport or other proper designation of the instrument should be given, so that there could be no mistake as to the identification of the instrument described with that produced in evidence in support of the indictment.

There is in the indictment before us manifestly great want of certainty and precision in the allegations essential to constitute the crime. As will be observed, it is not shown by any averment in the indictment that the bill of sale or chattel mortgage (whichever it may be) was assigned or transferred to the defendant by the owner, or that anything passed to the defendant more than the mere paper-writing, without the least interest in the property embraced or the money secured by the instrument. To constitute the crime, something within the definition of a valuable security must have been obtained by the false pretense, with intent to defraud some person of the same; but it is a little difficult to say that an instrument, such as that here described, without assignment or transfer, can be properly designated as a valuable security, of which a party has been deprived by false pretense, when nothing could pass to the defendant more than the paper upon which the instrument was written. The possession of the instrument by the defendant divested no right, nor did it invest the defendant with any right or power over the property or money secured by the instrument.

With respect to the other valuable securities charged to have been obtained by false pretenses by the defendant, the indictment is equally wanting in certainty and precision, to say nothing of an apparent defect for duplicity. Who was the maker or the payee or holder of the promissory notes referred to is not alleged. For aught that appears, the defendant himself may have been the owner and holder of the notes. If the proper reading of the indictment be, as we think it is, that by the false pretenses only the indorsements and signatures of the wife and her husband to the two promissory notes were obtained, it would seem to be very questionable whether, by any fair construction, the obtaining of such indorsements would be within the meaning of the statute which provides for punishing "any person who shall by any false pretense obtain from any other person any chattel, money, or valuable security with intent to defraud any person of the same": Code, art. 27, sec. 82; see case of *People v. Stone*, 9

Wend. 182, 190. The statute, by its terms, would seem clearly to contemplate a subsisting security of which the party could be deprived by fraud and false pretense, and of which he could have restitution, as by the statute it is provided he may, and not simply the obtaining of a signature to an instrument by false pretense, as where, in some of the states, such act is made criminal by express statute: *People v. Stone, supra*.

But the indictment is radically defective in another particular, and that is, in its failure to allege distinctly the ownership of the property or securities obtained. It is settled by all the authorities that it is no less requisite in indictments for obtaining property by false pretenses that the ownership of the property or securities obtained should be distinctly alleged than it is that such averments should be made in indictments for larceny.

The cases are numerous where it has been held that the omission to allege the ownership of property was fatal to the sufficiency of the indictment, even after conviction: *Regina v. Martin*, 8 Adol. & El. 481; *Regina v. Norton*, 8 Car. & P. 196; *Regina v. Parker*, 3 Q. B. 293; 2 Wharton's Crim. Law, 7th ed., sec. 2157. And since the statute 14 and 15 Victoria, chapter 100, section 8, apparently the prototype of our Act of 1862, chapter 80, whereby it is declared that it shall be sufficient, in any indictment for obtaining goods or property by false pretenses, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person, it has been held, upon full consideration, that that statute did not render it unnecessary to allege the ownership of the goods or money in the indictment, as formerly required: *Sill v. Regina*, Dears. C. C. 132; 1 El. & B. 553. As Lord Campbell, C. J., said in the case just referred to: "Section 8, upon which a plausible argument was suggested, shows that the legislature intended only to make it unnecessary to specify the individual defrauded, making it sufficient to show that there was an intent to defraud. But that does not obviate the necessity of showing to whom the goods belonged."

The indictment being bad on demurrer, the judgment of the court below must be affirmed.

FALSE PRETENSES. — Obtaining goods or money under false pretenses: See *State v. Hall*, 76 Iowa, 85; ante, p. 204, and note.

INDICTMENTS ARE GENERALLY SUFFICIENT when they charge the accused with a crime, using the same language which is used in the statute: Note to

State v. Campbell, 94 Am. Dec. 253-258; *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389. An indictment charging false pretenses, stating an offense in such a way as to advise the defendant of everything he was required to meet, although informal in certain respects, is sufficient, provided its supposed defects do not prejudice the substantial rights of the defendant: *State v. Palmer*, 40 Kan. 474.

BURROWS v. KLUNK.

[70 MARYLAND, 451.]

BLANK SPACES IN PROMISSORY NOTE, EFFECT OF LEAVING. — The fact that blank spaces sufficient to admit of alterations in the amount are left in a promissory note at the time when the indorser thereof writes his name upon it, does not constitute such negligence on his part as will render him liable to an innocent holder for value for the amount to which the note is afterwards wrongfully raised without the indorser's knowledge or consent. The indorser's assent to the alterations cannot be inferred from the fact that blank spaces were left in the note, in which there was room to insert a larger sum.

MATERIAL ALTERATION OF PROMISSORY NOTE DISCHARGES INDORSER. — Where a promissory note is complete at the time of its indorsement, an alteration in the amount thereof subsequently made without his knowledge or consent discharges him from all liability thereon.

ACTION on a promissory note. The opinion states the case.

John Guyton Boston and Charles Poe, for the appellant.

Charles W. Henisler, for the appellee.

MILLER, J. John Burrows sued Francis A. Klunk as joint maker or indorser of two promissory notes, each purporting to be for \$550, signed by Charles F. Klunk, dated February 7, 1887, and payable to the order of Burrows, one on the 1st of June, and the other on the 1st of July following. The defense is, that these notes had been fraudulently raised from \$50 to \$550 each. At the trial, two exceptions were taken by the plaintiff, which need not be stated at length. On some points there is conflict of testimony, but as to the following material facts there appears to be no contradiction.

Charles F. Klunk is the son of the defendant, Francis A. Klunk. The son had become indebted to the plaintiff, Burrows, in about the sum of four thousand dollars, and the plaintiff visited his house on the 5th of February, and told him to get notes indorsed by his father to the amount of eleven hundred dollars, and that his (the son's) father-in-law would settle the balance. On the same day the son called upon his father with five promissory notes in favor of Burrows, drawn up by

the son and signed by him as maker, for fifty dollars each, and asked his father to indorse them, which the latter positively refused to do. On the next day, February 6th, the plaintiff and the son visited the father at his house, but the plaintiff testifies there was nothing then said about indorsing notes in the presence of the father, and that he went there simply for the purpose of being introduced as the gentleman who was furnishing the son with goods. On the following Tuesday, February 8th, the son again called upon his father at his shop, again importuned him to indorse these five notes, and after a good deal of persuasion he agreed to indorse two of them, which matured respectively on the 1st of June and the 1st of July, 1887. Before doing so he took them to his office, read them over carefully, saw they were for fifty dollars each, that they were dated the 7th of February, and were payable to the order of the plaintiff. He then wrote his name on the back of each, and delivered them to his son. The latter has gone away, and when the notes were produced at the trial, it appears that the words "five hundred and" had been inserted before the word "fifty" in the body, and the figure "5" before the figures "50" in the left hand upper corner of each of them.

This statement is taken mainly from the testimony of the defendant, which in these particulars is uncontradicted. The notes themselves have been submitted to us for inspection. This inspection shows that if they were thus altered, the alterations must have been made by the son after his father wrote his name upon them, and before they were delivered to the plaintiff, and that they must have been in such condition when signed by the defendant as to admit of the alterations being so made as readily to deceive innocent third parties. There must have been a space between the "\$" and the figures "50" sufficient for the insertion of the figure "5," and a blank before the word "fifty" sufficient to let in the words "five hundred and." As they now appear, they are throughout in the handwriting of the son, who signed them as maker, written with the same ink, and with no discoverable trace of erasure.

It was left to the jury, by the granting of the plaintiff's and defendant's first prayers, to find whether the alterations had been made, and their verdict shows that they found this issue of fact in the affirmative. But the plaintiff has testified that he had no knowledge of these alterations when he received the notes, and the question is, Can he recover upon them against

the defendant, even if he had no such knowledge? It is manifest that if the defendant is made liable for the full amount of these altered notes, he will suffer a wrong and sustain a loss by means of a crime not less serious than the forgery of his signature. If his signature had been forged, or if the notes had been raised by obliteration of the writing by any chemical process, or by any other device of an ingenious forger, it is conceded he would not be liable. But, because these small spaces were in the notes when he wrote his name upon them, it is contended that he was negligent in signing and leaving them in that condition; and the doctrine that, where one of two innocent parties must suffer, that one should suffer whose negligence has enabled the third party to commit the wrong, is invoked against him. There are cases in which this doctrine has been applied to negotiable instruments in order to protect innocent holders for value, but we think the weight of authority in this country is against its application to a case like the present. In support of this position, we refer to the able judgment of the supreme court of Michigan, delivered by Judge Christiancy, in *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, and the equally able and elaborate opinion of the supreme judicial court of Massachusetts, delivered by Chief Judge Gray, in *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; 25 Am. Rep. 67; also to the cases of *Goodman v. Eastman*, 4 N. H. 455; *McGrath v. Clark*, 56 N. Y. 84; 15 Am. Rep. 372; *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264; 33 Am. Rep. 129; and *Worrall v. Gheen*, 39 Pa. St. 388. Such, also, seems to be the effect of the decisions of the supreme court in *Wood v. Steele*, 6 Wall. 80, and *Angle v. Northwest Mut. Life Ins. Co.*, 92 U. S. 330.

The case of *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36, 17 Am. Rep. 540, is quite different from this. The main question involved in that case was the extent of the liability of private corporations for the acts of their agents, done within the scope of their employment, expressed or implied. The party who committed the fraud was the treasurer and stock-transfer agent of the company, intrusted with its seal, with books of stock certificates signed in blank by the president, and was put in sole charge of the company's office in Baltimore. He was thus furnished by the company with every facility for making a fraudulent issue of stock. But here no such relation existed between the defendant and his son. The latter was neither the agent, nor even the employee, of

the former. The notes were simply delivered to him after they had been signed, for the purpose of being carried to the plaintiff.

Nor is it a case where one signs a note in blank as to amount, and delivers it to another for use, with intention that the blank should be filled. In such case the instrument carries on its face an implied authority to fill the blank, and the signer makes the person to whom it is thus delivered his agent for that purpose, and is responsible to an innocent holder for value for whatever sum may be inserted. But here each note was complete on its face when it left the hands of the defendant. A sum payable was actually written in it, and the date, time of payment, and the name of the payee were all inserted. In such case there can be no inference that the defendant authorized any one to increase this amount simply because blank spaces were left in which there was room to insert a larger sum. It may have been carelessness in the defendant to sign the notes without drawing lines through these spaces, but he was evidently not a business man accustomed to sign notes; and it was not his carelessness, but the crime committed by another, that was the proximate cause that misled the plaintiff.

Appellant's counsel have placed great reliance upon the English case of *Young v. Grote*, 4 Bing. 253. In that case, a husband, having occasion to leave home for several days, signed checks upon his banker in blank, left them with his wife, with directions to have them filled up with such sums as the purposes of his business might require during his absence. The wife, in order to pay wages to persons employed by her husband, directed a clerk, who was also employed by him, to fill up one of these checks for a certain sum. The clerk did so, showed it to her, and she directed him to draw the money from the banker. When drawn up by the clerk, the check was in substantially the same form, as to blank spaces, as these notes, and before he presented it, the clerk had in the same manner raised it to a much larger sum. The banker paid the raised check in good faith, and was protected in so doing against the claim of his customer, the husband. The difference as to facts between that case and this is, that there the check was signed in blank by the husband, who constituted his wife his agent to fill it up, and the raising or forgery was committed by a clerk in his employment. It was also a case between banker and customer; and in *Savings Bank v.*

Stowell, supra, the position is taken that "the maker of a promissory note holds no such relation to the indorsees thereof as a customer does to his banker; the relation between banker and customer is created by their own contract, by which the banker is bound to honor his customer's drafts, and if the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft, and thereby mislead the banker, the customer may well be held liable to the banker." There is force in this position; but the case of *Young v. Grote, supra*, though it has not, so far as we can ascertain, been directly overruled, has been seriously questioned, not so much as to its result, but as to the reasoning on which it is founded. Subsequent comments of the English judges go far to limit the doctrine there laid down to the peculiar circumstances of that case. All the decisions containing the comments made up to that time are referred to in *Greenfield Savings Bank v. Stowell, supra*. To these we may add the more recent case of *Baxendale v. Bennett*, in the court of appeal, L. R. 3 Q. B. Div. 525, in which Brett, L. J., said: "I think the observations made by the lords in the case of *Governor and Company of Bank of Ireland v. Trustees of Evans's Charities in Ireland*, 5 H. L. Cas. 389, have shaken *Young v. Grote*, and *Cole v. Bank of England*, 10 Ad. & E. 437, as authorities." The case is discredited, if not overruled as an authority, and we have found no English decision in which the maker of a promissory note has been held liable under circumstances similar to those which exist in the present case.

We approve and adopt the following reasoning in *Holmes v. Trumper*, 22 Mich. 427; 7 Am. Rep. 661: "The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above it in apparent harmony with the rest of the instrument; or as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. . . . Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and unless, perhaps,

when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders. If promissory notes were only given by first-class business men, who are skillful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the appellant would require. But for the great mass of the people, who are not thus skillful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men of even fair education and competency for business at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper."

We are all of opinion that the defendant is not liable for the amount of these raised notes. In some of the cases, especially in Pennsylvania and Mississippi, recovery has been allowed for the amount of the note before it was thus altered. This, however, seems to ignore the principle, said to be of universal application, that any material alteration of a written instrument avoids it *in toto* as to any party to it who has not assented to such alteration. But that question does not arise on this appeal. The verdict and judgment were in favor of the plaintiff for the original amount of the notes, with interest, and the defendant has not appealed.

In thus disposing of the case we have assumed, and must not be understood as having decided, that the plaintiff is a holder for value. It follows, from what we have said, that the court below was right in admitting the testimony objected to in the first exception, and that there is no error prejudicial to the appellant in the rulings upon the prayers. The judgment is therefore affirmed.

FILLING IN BLANKS IN WRITTEN INSTRUMENTS: See note to *Stahl v. Berger*, 13 Am. Dec. 669-671.

NEGOTIABLE INSTRUMENTS — FILLING BLANKS. — If the maker of a note or other negotiable instrument leaves it in such a condition at its issuance by him that it may easily be altered without detection, he is liable thereon

to a *bona fide* holder who takes it in the usual course of business: *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75; *Garrard v. Hadden*, 67 Pa. St. 82; 5 Am. Rep. 412; *Rainbolt v. Eddy*, 34 Iowa, 440; 11 Am. Rep. 152; *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318; *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573, and note; *Yocum v. Smith*, 63 Ill. 321; 14 Am. Rep. 120; *Spittler v. James*, 32 Ind. 202; 2 Am. Rep. 334, and note; *Blakey v. Johnson*, 13 Bush, 197; 26 Am. Rep. 254; *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18, and particularly note 25, 26.

ALTERATIONS IN NEGOTIABLE INSTRUMENTS, without the consent of an indorser, discharges him from all liability thereon: Extended note to *Draper v. Wood*, 17 Am. Rep. 97-106; *National Ulster Co. Bank v. Madden*, 114 N. Y. 280; 11 Am. St. Rep. 633, and note; compare *Cronwell v. Labree*, 81 Me. 44; 10 Am. St. Rep. 238, and note; *Davis v. Eppler*, 38 Kan. 629.

ALTERATION OF WRITTEN INSTRUMENTS, general rules of law applicable to: See extended note to *Woodworth v. Bank of America*, 10 Am. Dec. 267-273. A note is not invalidated by immaterial alterations, innocently made, which affect it in no material manner: *First Nat. Bank v. Wolff*, 79 Cal. 69. Where, by the terms of a non-negotiable note, interest was made payable without specifying the rate, and, after its delivery, "7" was inserted in the blank space left for that purpose, the alteration of the note was immaterial, and did not affect the validity of the contract: *First Nat. Bank v. Carson*, 60 Mich. 432. When at maturity of a note a partial payment is made thereon, a renewal note, given to secure the unpaid balance, which is invalid as to one of the makers by reason of a material alteration, — the insertion of the words "with interest," — without his knowledge and consent, a recovery can be had against such maker on the original cause of action: *Owen v. Hall*, 70 Md. 97; *First Nat. Bank v. Carson*, *supra*.

HUGHES v. NIKLAS.

[70 MARYLAND, 484.]

RULE IN SHELLEY'S CASE, LEASEHOLD PROPERTY WITHIN. — Where a testator by his will gives and bequeaths all his property, consisting of houses and vacant lots, to his adopted child "during her natural life, with remainder over to the heirs of her body, if she should have any," said property being leasehold property, and in a subsequent clause of the will gives to her all the residue of his property, of whatsoever name or nature, without limitation or restriction, the bequest in the first clause is, by analogy at least, directly within the rule in Shelley's case; the gift of the leasehold interest to said child for life, with remainder over to the heirs of her body, entitles her to the absolute interest, which is not restricted by the words "if she should have any heirs"; and even if the provisions of the second clause indicate that the testator intended to give her only a life estate under the first clause, the words actually used in the first clause bring the gift within the rule, and the intention must give way, and the fixed rule must be followed.

BILL of interpleader filed by the tenant of the leasehold property, referred to in the opinion, requiring the parties to this appeal to interplead, for the purpose of ascertaining which

was entitled to the rent due by the tenant. The court below decreed the fund to the appellee, and the appeal is taken from this decree. Other facts are stated in the opinion.

William E. Hoffman, for the appellant.

Peter J. Campbell and C. Dodd McFarland, for the appellee.

McSHERRY, J. The single question involved in this appeal is, What estate did Jane Shaw take under the will of George Ackerman in certain leasehold property? It is insisted by the appellant that she took an absolute interest therein, whilst the appellee contends that she was entitled only to a life estate, and that upon her decease, the remainder passed to Christiana Snyder. The will of George Ackerman must determine this controversy. It bears date May 16, 1831, and was admitted to probate October 28, 1834. The only clauses which have any reference to the question before us are in the following words: "And to my adopted child, Jane Shaw, whom I have raised from infancy, and who now lives with me, I give and bequeath all my property, consisting of houses and vacant lots situate on the west side of High Street, between York and Pitt streets, in the city of Baltimore, during her natural life, with remainder over to the heirs of her body, if she should have any; but in case she should die without such heirs, then the said remainder to my cousin, Christiana Snyder, widow as aforesaid, to her and her heirs forever."

"And I give all the residue of my property, of whatsoever name or nature, to the said Jane Shaw, without limitation or restriction," etc.

It is conceded that the property referred to in the first of the two clauses quoted was leasehold property. Jane Shaw married William Campbell. She died in 1886, without ever having had issue. She left a last will and testament, whereby, after making small bequests to other persons, she gave the residuum of her estate to John W. Hughes, a grandson of her deceased husband, and she appointed him executor. He is the appellant in this case. Christiana Snyder also died, leaving a will, by which she gave the residuum of her estate to her grandchildren. The appellee is administrator *de bonis non cum testamento annexo* of her estate.

It has been argued that the intention of George Ackerman, apparent on the face of the will, was to give Jane Shaw merely a life estate in the leasehold property, and that this intention must control the construction to be placed on the language

used in making the bequest of that property to her. It is undoubtedly true that a testator's intention, when legally manifested, will be given effect to, unless it violates some fixed principle of law, or would, if gratified, break down some settled rule of property, or unless it be defeated by the use of technical words whose meaning, when they are found in wills, is inflexible and unvarying. For instance, no matter how clear may be the intention to create a perpetuity, it cannot be gratified, because forbidden by law; and even though the intention to give but a life estate may be perfectly evident, yet if, in attempting to create it, words have been employed which have invariably been held to carry the fee, the fee, and not a mere life estate, will pass. There is, perhaps, no rule of property more deeply rooted in the jurisprudence of this state than that which is known as the rule in Shelley's case. It is a rule of tenure which is not only independent of, but generally operates to subvert, the intention; and so firmly is it, with its qualifications, established here, that, as said by this court in *Shreve v. Shreve*, 43 Md. 394, "nothing but an act of the legislature can strike it out of our system of real law."

The definition of the rule given by Mr. Preston (1 Preston on Estates, 263), adopted with slight modifications by Chancellor Kent (4 Kent's Com. 215), and quoted with approval in *Ware v. Richardson*, 3 Md. 544, 56 Am. Dec. 762, is so familiar that it need not be repeated in this opinion.

If the subject of the gift to Jane Shaw had been real estate, she would have taken, under the rule, an estate in fee-tail, which, by the operation of our law of descents, would have been converted into an estate in fee-simple, notwithstanding the most positive and unequivocal declaration that she should take only an estate for life. But it is supposed a different result must follow in this case because the gift relates to personal property. In support of this position our attention has been called to the cases which hold that, in respect to personal estate, attention is paid to any circumstance that seems to afford ground for construing a limitation after dying without heirs or without issue to mean a dying without heirs or issue living at the death of the party, in order to support a bequest over, though as to real estate the construction is generally otherwise: *Wallis v. Woodland*, 32 Md. 104; *Gable v. Ellender*, 53 Id. 311. But the principle which strikes down as void, because too remote, a limitation in remainder after an indefinite failure of issue is not the one upon which the rule in Shelley's case is

founded, nor upon which the decision of the case before us depends.

If the rule in Shelley's case is applicable to leasehold estates as well as to a freehold, the case is entirely free from difficulty. In *Butterfield v. Butterfield*, 1 Ves. 154, the testator directed that four hundred pounds should be put out on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body, and if it should so happen that he should die without heirs of his body, it should go to his youngest son, B. Lord Hardwicke held that the son T. should take the whole absolute interest. In *Garth v. Baldwin*, 2 Id. 646, personal property was limited to trustees to pay the profits to Edward Turner Garth for life, and afterwards to pay the same to the heirs of his body. The lord chancellor held that the case was reduced to this: a gift of personal estate to one for life and the heirs of his body,—that must vest the property in him, whether the testator intended it or not. In *Atkinson v. Hutchinson*, 3 P. Wms. 259, the lord chancellor stated that if a term of years be limited to A for life, remainder to the heirs of his body, A would take the whole interest. In *Elton v. Eason*, 19 Ves. Jr. 78, the master of the rolls said: "It is clearly settled that a bequest of personal property to a man for life, and afterwards to the heirs of his body, is an absolute bequest to the first taker. Whatever disposition would amount to an estate-tail in land gives the whole interest in personal property, which is incapable of being entailed." And in *Horne v. Lyeth*, 4 Har. & J. 431, which, though not a decision by the court of appeals, has been followed and approved in many cases by this court, it was distinctly determined "that, if a leasehold estate is limited to one for life, the remainder to the heirs of his body, the whole interest vests in the first taker, and that the words 'for life' will not be sufficient to restrict his interest to a life estate." This was recognized in *Warner v. Sprigg*, 62 Md. 14.

It would seem, then, to be perfectly clear that the bequest to Jane Shaw is, by analogy at least, directly within the rule. The gift is of a leasehold interest to Jane Shaw during her natural life, with remainder over to the heirs of her body, if she should have any, as a class of persons to take in succession from generation to generation. The limitation to the heirs entitled her to the absolute interest, which was not restricted by the words "if she should have any" heirs. The second clause quoted from the will cannot affect this conclu-

sion. It is claimed its provisions plainly indicate that the testator intended to give Jane Shaw only a life estate under the first clause; but even if this should be conceded, the result would not be changed, because, no matter how evident the intention to create but a life estate may be, when the words actually used bring the gift within the rule, the intention must give way, and the fixed rule must be followed. Accordingly, Hughes, who claims under the will of Jane Shaw, is entitled to the estate, and the funds brought into court, being the rent due by the lessee of the term, are payable to the appellant.

There was error, therefore, in the decree below, which denied the appellant's right to these funds, and it must be reversed. The cause will be remanded that a decree may be passed in conformity with this opinion.

RULE IN SHELLEY'S CASE. — For a full and complete discussion of the rule in Shelley's case, see extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100-107; note to *Pelt v. Paris*, 30 Am. Dec. 415-417. The rule in Shelley's case, if ever in force in New Hampshire, has been abolished by statute so far as it applies to devises of realty: *Cloutman v. Bailey*, 63 N. H. 44.

MANUFACTURERS' NATIONAL BANK OF BALTIMORE v. SWIFT.

[70 MARYLAND, 515.]

BANK IS BOUND TO KNOW STATE OF ITS DEPOSITOR'S ACCOUNT; and if it makes a mistake in this respect, it must abide the consequences.

PRESENTATION OF CHECK IS DEMAND FOR PAYMENT THEREOF; and if it is paid, all the rights of the payee have been satisfied, and he has no right to ask any questions.

PAYMENT OF CHECK BY BANK IS REGARDED AS FINALITY, in the absence of fraud on the part of the holder; and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder.

PETITION filed by the appellant asking that the decree against the appellee and itself might be entered to its use, and that said co-defendant might be directed to make good to it the amount of said decree. The court below dismissed the petition, and the petitioner appealed. Other facts are stated in the opinion.

John Prentiss Poe, for the appellant.

Frederick W. Story and Charles Marshall, for the appellee.

BRYAN, J. When this case was before the court on the first appeal, it was decided that the Manufacturers' Bank and Swift were both responsible to the trustees of the Bull estate for the full amount of the sum now in controversy. It was held that the question of primary and secondary liability was not presented, and the court studiously refrained from determining which of these parties must ultimately bear the loss; laying down the rule, as applicable to the case, that all parties to a breach of trust are equally liable, and there is no primary liability: *Swift v. Williams*, 68 Md. 236. No further controversy is admissible on the questions then decided. Since the decree of this court, the Manufacturers' Bank has paid to the trustees of the Bull estate the whole of this sum, and we are now required to determine whether Swift is bound to indemnify the bank in whole or in part.

We will mention some of the prominent facts which show the relations between the parties in respect to this matter, and then we will consider other matters in evidence which are supposed to change or modify these relations. Veazey was the trustee of the Gazette Publishing Company, and in that capacity was required to pay to Swift the sum of \$14,144.82. On the fifteenth day of July, 1886, he delivered to E. O. Hinkley, Esq., Swift's solicitor, a check for this amount on the Manufacturers' Bank, signed "I. Parker Veazey," trustee, and received from him a release of Swift's claim. This check was paid by the said bank, although Veazey had no funds in the bank at the time of payment properly applicable to this purpose. If there were nothing further in the case, the question would be of the simplest possible description. It is the duty of a bank to know the state of its depositor's account; and if it makes a mistake in this respect, it must abide the consequences. The presentation of a check is a demand for payment; if it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality; and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder: *Oddie v. National City Bank of New York*, 45 N. Y. 735; 6 Am. Rep. 160.

In *Levy v. Bank of the United States*, 1 Binn. 27, and 4 Dall. 234, one Thomas passed to Levy a check on the bank purporting to be drawn by one Wharton in favor of Thomas, or bearer; this check was received by the teller, and entered to Levy's credit in his bank-book as cash. On the same day, in the course of a few hours, it was discovered that the signature to the check was a forgery, and as soon as the discovery was made, notice of it was given to Levy. It was held that the loss must fall on the bank. This decision is cited with approval by the supreme court of the United States in *United States Bank v. Bank of Georgia*, 10 Wheat. 333. It is also approved by this court in *Commercial and Farmers' National Bank v. First National Bank*, 30 Md. 19, 96 Am. Dec. 554, where the case in Wheaton, and other cases of similar bearing, are also adopted. Unless there is something to take the present case out of the general rule, we think it very clear that the payment of Veazey's check was conclusively binding on the Manufacturers' Bank.

When Mr. Hinkley received this check from Mr. Veazey, he deposited it in the Union Bank to the credit of Hinkley and Morris, a legal firm of which he was the senior member. On the following day it was sent through the clearing-house to the Manufacturers' Bank, and payment of it being refused, it was returned to the Union Bank. Thereupon it was delivered to Hinkley, and he gave the Union Bank the check of Hinkley and Morris for the same amount, to counterbalance the credit they had received for it. Within a few minutes after he had received the Veazey check from the Union Bank, Mr. Hinkley was informed by Mr. Veazey and Mr. Hindes, the cashier of the Manufacturers' Bank, that the check was "all right," and he immediately deposited it a second time in the Union Bank, and in the course of the day it was paid.

The occurrences must now be noticed which caused this mode of dealing with the check. Messrs. Veazey and E. Calvin Williams were trustees of the Bull estate, and, as such, were entitled to receive from J. C. C. Justis \$28,121.55. During the absence of Mr. Williams in Europe, Mr. Veazey was authorized, by an order of court, to receive the money. On the fifteenth day of July, 1886, a check on the Mechanics' Bank for the amount was delivered to him, which, by due indorsement, had been made payable to the order of L. Parker Veazey and E. Calvin Williams, trustees. This check Veazey indorsed and deposited in the Manufacturers' Bank to the

credit of an account of "I. Parker Veazey, trustee." This check, passing through the clearing-house, on the following day reached the Mechanics' Bank, and payment was refused because it was not indorsed by both of the trustees, Veazey and Williams. Notice being given to the Manufacturers' Bank, it, in turn, gave notice to the Union Bank that Veazey's check to Hinkley would not be paid. Later in the day a deposit was made by Justis to the amount of this check in the Manufacturers' Bank to the credit of I. Parker Veazey and E. Calvin Williams, trustees; and it was agreed between Veazey and the said bank that the check to Hinkley should be paid, and that it should be altered by affixing the name of E. Calvin Williams, trustee, as one of the drawers. Of this transaction Hinkley was kept in entire ignorance. Notice was then given by the Manufacturers' Bank to the Union Bank that the check was recognized as good, and it was delivered to the runner of the former bank. According to the rules of the clearing-house, this receipt and recognition of the check was a payment of it, and entitled the Union Bank to a credit for its amount in settlement with the Manufacturers' Bank. After the payment thus made, the signature of the check was altered by Veazey so as to read as follows: "I. Parker Veazey, trustee, E. Calvin Williams, trustee, per I. Parker Veazey." The check when delivered to Hinkley was, in form and legal effect, such as he was entitled to receive, and such it remained until it was paid by the bank on which it was drawn, with a full and entire knowledge of every circumstance connected with it from its origin until its payment. Immediately on its payment, Mr. Hinkley remits the proceeds to his client, who resided in another state. On the 28th of September, two months and twelve days after the settlement of the business, he hears for the first time that objections are urged against the payment of the check. If the bank could recover this money from Swift, it would be an extremely dangerous matter to do business with a bank; no one could know when he could safely receive payment of a check. We think, however, that the law has provided rules for the transaction of this kind of business, which are sound and sensible, and which promote convenience and security in commercial dealings. When, with full and perfect knowledge of the facts, and without the least element of surprise, imposition, or misrepresentation, a bank has elected to pay a check, the law could never permit it to undo the transaction

and recover the money back. The alteration of the signature of the check after it had been paid was a nugatory act. It could not authorize the bank to charge the check against the account standing in the name of the two trustees. That account could be legally charged only by a check signed by both of them. Entering the Hinkley check on the books of the bank as a debit against this account was without significance; the responsibility of the bank was not in the least degree diminished by such an entry.

The foregoing considerations are intended to show how the bank and Swift stand in reference to each other. On the former appeal it was held, that as against the representatives of the Bull trust, Swift could not be "allowed to retain the money which had been paid to him from a fund on which he had no claim, and which was charged against that fund and no other." But in the present controversy the Bull trust is in no wise interested; it has been fully reimbursed for the conversion of its money. This conversion was effected by the wrongful change in the signature of the Veazey check after it had been paid,—a change made without Hinkley's knowledge or consent, and after the check had passed out of his possession and beyond his control. The simplest principles of justice require that those who did this great wrong to the trust fund should redress the injury which they committed. They should be compelled to restore the spoliated trust fund to its original integrity. But assuredly there is nothing in the transaction which can give them recourse against any other person. The responsibilities of third persons are measured by their own conduct. If they have done the agents of this mischief no wrong, they cannot be required to make them any compensation. The bank can derive no special claim from the fact that it was dealing in this unauthorized way with trust funds; while, with respect to the bank, Swift stands like any other holder of a check who presents it in the ordinary course of business, and receives payment without knowledge of any peculiar circumstances affecting it.

In our opinion, the matters which we have stated settle the rights and responsibilities of these parties. And it is perhaps not strictly necessary that we should give our views upon other questions which have been discussed at the bar. We, however, take occasion to say, that while the officers of the Manufacturers' Bank committed great errors of judgment, there was not the least purpose to do any intentional wrong to

anybody. We regard the conduct of Mr. Hinkley as highly becoming to an upright and intelligent solicitor. We are satisfied that he did not know, and had no reason to believe, that Veazey was committing a breach of trust. A gentleman from his office, who, at his request, called on Veazey for the money due from the Gazette Publishing Company, had been told by Veazey "that it was out on call, that he would have to give some notice, and that it would take several days to get it in." Veazey also told Hinkley that he would have to give "notice" before he could get it. When he received Veazey's check, it was in a form sufficient and appropriate to pay the money of the Gazette Publishing Company, and it was deposited in bank in strict conformity to the usual course of business. With regard to Mr. Hindes's testimony in reference to a conversation which he says he held with him in the Union Bank on the 16th of July, about half-past twelve o'clock, we are constrained to think there is some error. He says that he told Hinkley that the check would not be paid, and that Mr. Williams was associated in the matter. Hinkley positively and emphatically denies that any such conversation took place, and says that he does not remember that he was in the Union Bank on that day, except on one occasion, and that was about eleven o'clock, immediately after he had been assured both by Veazey and Hindes that the check was "all right." Mr. Wells, the cashier of the Union Bank, testifies that he saw him at this time; and no one connected with the bank testifies that he was there at any other time during the day. The singularity of such a conversation must have made an impression on his mind which he could not have forgotten. Let us consider how the case would have stood. A check for a large amount is refused payment; immediately afterwards the holder is informed by the drawer of the check and the cashier of the bank which refused it that it was all right, and he is requested to redeposit it; in about an hour and a half he is informed by the same cashier that it will not be paid; and then after the delay of about an hour the check is paid. An experience so unusual and extraordinary must have made a lasting impression on the memory. Mr. Hindes probably mistook some other person for Mr. Hinkley, or he may have confounded together some of the many conversations which took place on this subject.

The decision of the circuit court is in accordance with our views, and it will be affirmed, with costs.

BANKS AND BANKING. — When a bank receives from the payee a genuine check drawn upon itself by a customer as a deposit, and credits to the payee's deposit account, it becomes a debtor to him for such amount, and cannot repudiate the relation of debtor and creditor because the drawer's account was overdrawn by such check: *Oddie v. National City Bank*, 45 N. Y. 735; 6 Am. Rep. 160; but in Massachusetts, it has been held that money paid to the holder of a check or draft drawn without funds might be recovered back if paid by the drawee under a mistake of fact: *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; 100 Am. Dec. 120; and in California, checks deposited with a bank and credited in the depositor's pass-book, in the absence of a special agreement to the contrary, are taken for collection and not for cash: *National Gold Bank v. McDonald*, 51 Cal. 64; 21 Am. Rep. 697.

STATE v. CARRICK.

[70 MARYLAND, 566.]

MINISTERIAL ACT, LIABILITY OF JUSTICE OF PEACE FOR REFUSAL TO PERFORM. — The issuing of the writ of *retorno habendo* by a justice of the peace is an official act which it is his duty to perform, and as it is an act purely ministerial in its nature, involving no exercise of judgment or discretion, he is liable on his official bond for his refusal or neglect to perform it.

CONDITION OF JUSTICE'S BOND EMBRACES REFUSAL TO PERFORM MINISTERIAL ACT. — The condition of the official bond of a justice of the peace, required by the act of 1876, chapter 28, that he "will truly and faithfully discharge, execute, and perform all and singular the duties and obligations of the office of justice of the peace," is broad enough to embrace the neglect or refusal to perform any ministerial act, the performance of which is devolved upon him by law.

APPEAL BOND MUST BE GIVEN TO STAY EXECUTION IN REPLEVIN. — The new condition to replevin bonds in magistrates' cases, added by the act of 1888, chapter 235, to the effect that the plaintiff will not only abide by and perform the judgment of the justice, but also "of the circuit court of the county or Baltimore city court, as the case may be," does not obviate the necessity of giving an appeal bond in such cases.

DECLARATION IN THIS CASE HELD SUFFICIENT AGAINST GENERAL DEMURRER.

ACTION on official bond. The opinion states the case.

William Colton, for the appellant.

Frederick C. Cook, for the appellees.

MILLER, J. The suit in this case is upon the official bond of a justice of the peace executed under the act of 1876, chapter 28. The defendants, who are the magistrate and his sureties in the bond, demurred to the declaration. The court below sustained the demurrer, and gave judgment for the defendants, and hence this appeal.

The act referred to requires each justice of the peace of the

city of Baltimore to give a bond to the state, with surety or sureties, in the penalty of five thousand dollars, "with conditions that he will truly and faithfully discharge, execute, and perform all and singular the duties and obligations of the office of justice of the peace; and that he will account for and pay over" to the officials and parties entitled to receive the same, all fines, penalties, and forfeitures, and all money which may come to his hands as such justice of the peace.

The breach relied on, as we gather from the declaration, is substantially as follows: One Aaron Cohen brought an action of replevin before Carrick, the magistrate, against Sarah Whitehill, who was a seamstress, for the recovery of certain chattels, among which was a sewing-machine. The property was taken under the writ of replevin, and delivered to Cohen. Upon the trial of the case by the magistrate, he gave judgment in favor of the defendant Sarah, "for the return of the goods, chattels, and effects replevied from her by the said Cohen, and for one cent damages and costs." As soon as this judgment was rendered, the defendant Sarah applied to the magistrate to issue the writ of *retorno habendo* for the return of her property, her purpose being to regain at once possession of her sewing-machine, upon the use of which her livelihood depended; but the magistrate, as the declaration alleges, "wrongfully and willfully and defiantly refused and declined to issue said writ" until a *mandamus* had been issued by Baltimore city court to compel him to do so. Such is the complaint; and the question is, Does the neglect or refusal to issue this writ amount to a breach of the obligation imposed upon the magistrate by this act of assembly and his bond?

The declaration does not charge that he acted maliciously, fraudulently, and corruptly; and if we could bring our minds to the conclusion that the issuing of this writ involved in any degree the exercise of judgment or discretion, we should hold the action would not lie, for it is well settled that neither a justice of the peace nor any other judicial officer can be held liable, either civilly or criminally, for error of judgment or mistake honestly made in regard to the performance of any judicial act or duty: *Knell v. Briscoe*, 49 Md. 414. But here the defendant was entitled to have the judgment in her favor executed at once, unless the plaintiff had taken an appeal, and given an appropriate appeal bond.

The proper writ of execution upon such a judgment in an action of replevin is a *retorno habendo* directed to the sheriff,

commanding him to cause the property taken under the writ of replevin to be delivered back to the defendant, and the sheriff must execute it by force, if necessary. It is true, this process is not often resorted to in practice, as the usual remedy is upon the replevin bond, but it is a writ of final execution on a judgment like this, and is used whenever the defendant desires to regain possession of the specific property: 2 Poe on Pleading and Practice, sec. 624; 2 Harris on Entries, 725.

The defendant, in accordance with the local law on the subject (2 Code of 1860, art. 4, sec. 622), made demand in person upon the magistrate to issue this writ. It was a writ of execution which the law awarded to her on her judgment as of right, and we are constrained to hold that the issuing of it by the magistrate was an official act which it was his duty to perform, and which in its nature was purely ministerial, involving no exercise of judgment or discretion. The question has not hitherto arisen in this court in regard to executions to be issued by justices of the peace, and in the courts of general jurisdiction such process is always issued by the clerks, whose official bonds are unquestionably responsible for neglect or refusal to act in such cases. But in other states, wherever a case has arisen in regard to magistrates, the authorities are uniform to the effect that to issue an execution is to perform a ministerial act: *Noxon v. Hill*, 2 Allen, 215; *Place v. Taylor*, 22 Ohio, 317; *Fairchild v. Keith*, 29 Id. 156; *Gowing v. Gowing*, 12 Iowa, 495. To the same effect also are the text-books: Cooley on Torts, 378; Murfree on Official Bonds, sec. 314.

Under our system of laws, the duties of a magistrate are partly judicial and partly executive or ministerial. In civil suits brought before him, he acts judicially in hearing and determining the case, and in some other respects his duties involve the exercise of judgment or discretion, such as approving the sureties on an appeal bond; and for mistake or error of judgment in such cases, the law will not permit his acts to be questioned in a civil action. But he must also perform all manual or clerical duties the performance of which is expressly required by statute, such as docketing the cause, making proper entries therein, and issuing executions on his judgments when required to do so. These are official, but not judicial, acts, and for the refusal or neglect to perform them, his official bond, if he has given one, such as is required by the act of 1876, chapter 28, must, in our opinion, be held

responsible. The condition of the bond required by this act, that the magistrate "will truly and faithfully discharge, execute, and perform all and singular the duties and obligations of the office of justice of the peace," seems to us quite broad enough to embrace the neglect or refusal to perform any merely ministerial act the performance of which is devolved upon him by law. We are also of opinion that it was the purpose and intent of the legislature in passing this act of 1876, as manifested by the act itself, to protect suitors and others having business before the magistrates of Baltimore city from loss occasioned by the non-performance by such officials of these merely ministerial duties, whether such non-performance be the result of their ignorance, incompetency, or careless or willful neglect, or refusal to perform them. The act may also cover other like cases of neglect or carelessness, but it is sufficient here to say that the neglect or refusal complained of in this case is clearly within the condition of the magistrate's bond.

We have been referred to the Act of 1888, chapter 235, which adds a new condition to replevin bonds in magistrates' cases, to the effect that the plaintiff will not only abide by and perform the judgment of the justice, but also "of the circuit court of the county or Baltimore city court, as the case may be"; and it is insisted that the giving of such a bond obviates the necessity of giving an appeal bond in such cases. But we do not agree that such is the effect of this statute. Jurisdiction of magistrates in replevin was conferred before the adoption of the Code of 1860, and is embodied in that code: Art. 51, sec. 15. In the same code there is a general provision that execution of judgments of magistrates shall not be stayed unless appeal bonds be given: Art. 5, sec. 56. It is true that the form of the bond required by this section points primarily to money judgments, but appeal bonds in replevin cases were perfectly well known, and were constantly used, before the act of 1888, and under the Code of 1860, and we take it to be perfectly clear that execution of such a judgment can only be stayed by giving an appeal bond. The mere fact that an additional condition is put in the replevin bond does not, in our opinion, dispense with the necessity of giving an appeal bond in order to stay execution in such cases.

This declaration was evidently not framed by an experienced lawyer, but in the amended form in which it is presented to us, we think there is enough in it, however loosely

stated, to make out a *prima facie* case, so as to enable it to stand against a general demurrer. It is to be noticed that the suit is upon the bond, and not upon the judgment of the magistrate, in which latter case, more particularity in setting out the judgment and showing that the magistrate had jurisdiction to render it would be required. If in fact there was an appeal bond given when the demand to issue the writ of execution was made, or if the defendants can show any other defensive matter exonerating the magistrate, they can, of course, do so by proper pleas. All that we now decide is, that the declaration makes out a *prima facie* case of liability under this bond.

Judgment reversed, and a new trial awarded.

JUDICIAL OFFICERS WITH MINISTERIAL DUTIES. — Often a judicial officer is called upon to perform ministerial duties, and with respect to such duties he is liable for non-feasance or misfeasance, like other ministerial officers: *Stone v. Graves*, 8 Mo. 148; 40 Am. Dec. 131; *Kerns v. Schoonmaker*, 4 Ohio, 331; 22 Am. Dec. 757; and this rule applies to justices of the peace in their ministerial capacities: *Tompkins v. Sands*, 8 Wend. 462; 24 Am. Dec. 46; though it has been doubted whether the issuing of an execution by a justice was a ministerial duty: *Wertheimer v. Howard*, 30 Mo. 420; 77 Am. Dec. 623, and note.

POWER OF COURTS TO STAY EXECUTIONS: See extended note to *Commonwealth v. Magee*, 49 Am. Dec. 513 et seq.; *Castro v. Illies*, 23 Tex. 479; 73 Am. Dec. 277.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FEARING v. JONES.

[149 MASSACHUSETTS, 12.]

GIFTS — DONATIO CAUSA MORTIS. — Where one whose wife was in an insane hospital, and who had quarreled with his daughters, two days before his death said to defendant, with whom he boarded, "I did hope to live to see the end of my wife"; when defendant replied, "What shall I do if anything happens to you?" and the deceased said, "Go for Cole, the undertaker; have me buried with the money from the Mechanic Association; and do as you please with what I have," but there was no delivery of any articles, the transaction did not constitute a *donatio causa mortis*, as both words of present gift and delivery are wanting.

S. W. Trowbridge, for the plaintiff.

W. H. H. Emmons, for the defendant.

HOLMES, J. The evidence relied on to show a *donatio causa mortis* by Cushing to the defendant is as follows: Cushing boarded with the defendant, his wife was in an insane hospital, and he had quarreled with his daughters. Two days before his death, he said to the defendant, in his room, "I did hope to live to see the end of my wife." The defendant replied, "What shall I do if anything happens to you?" Cushing said, "Go for Cole, the undertaker; have me buried with the money from the Mechanic Association; and do as you please with what I have." There was no ceremony of delivery of any articles. Most of the property was present in Cushing's room, and all of it was in the defendant's house; but it does not appear that she attempted to intermeddle with it in any way before Cushing's death.

The words used did not purport to make a present gift, but looked only to the future, and to what should be done when

Cushing died. As the language did not express a gift, it could not warrant the inference that there was a delivery without further overt acts on either side, even if such an inference might be drawn from different language, coupled with the ambiguous situation of the property: See *Waring v. Edmonds*, 11 Md. 424; *Cutting v. Gilman*, 41 N. H. 147. There was no other evidence of delivery, as the defendant did not touch the property in Cushing's lifetime. Both elements of a *donatio causa mortis*, words of present gift and delivery, are wanting. There is no occasion, therefore, to reconsider, as we are asked to do, the statement in *Marshall v. Berry*, 13 Allen, 43, 46, that an attempt to dispose of the donor's whole estate, as distinguished from specific articles capable of passing by delivery, is void.

Exceptions overruled.

GIFTS — DONATIO CAUSA MORTIS. — As to what is essential to make a valid gift *causa mortis*: *Smith v. Ossipee Valley etc. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400, and note 403; *Drew v. Hagerty*, 81 Me. 231; 10 Am. St. Rep. 255, and note 257.

CLAFLIN v. CLAFLIN.

[149 MASSACHUSETTS, 19.]

WILLS — RESTRAINT ON POSSESSION. — Provisions in a will, requiring a trustee to hold and manage the trust property until the beneficiary reaches an age beyond twenty-one years, are not necessarily void if the interest of the beneficiary is vested and absolute. Under this rule, the testator may direct the trustee to pay portions of the trust funds to the beneficiary when he reaches the age of twenty-one, twenty-five, and thirty years, respectively; and such direction is not void as against public policy, nor inconsistent with the beneficiary's rights of property.

S. N. Aldrich and E. G. McInnes, for the plaintiff.

H. Baldwin, for the defendants.

FIELD, J. By the eleventh article of his will, as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz., ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of

the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Claflin was not quite twenty-one years old when his father died; but he some time ago reached that age, and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it; and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the house of lords, and but one by a lord chancellor, but there are several decisions to this effect by masters of the rolls and by vice-chancellors. The cases are collected in Gray's Restraints on Alienation, secs. 106-112, and appendix 2. See *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115, and, on appeal, Craig & P. 240; *Rocke v. Rocke*, 9 Beav. 66; *In re Young's Settlement*, 18 Id. 199; *In re Jacob's Will*, 29 Id. 402; *Gosling v. Gosling*, John. 265; *Turnage v. Greene*, 2 Jones Eq. 63; 62 Am. Dec. 208; *Battle v. Petway*, 5 Ired. 576; 44 Am. Dec. 59.

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because, in each case, it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris*, and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold

and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute: See *Smith v. Harrington*, 4 Allen, 568; *Bowditch v. Andrew*, 8 Id. 339; *Russell v. Grinnell*, 105 Mass. 425; *Inches v. Hill*, 106 Id. 575; *Sears v. Choate*, 146 Id. 895; 4 Am. St. Rep. 320. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In *Sears v. Choate*, *supra*, it is said: "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it; and it is reasonable and just that they should have the control and disposal of it, unless some good cause appears to the contrary." In that case, the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently, the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches v. Hill*, 106 Mass. 575, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner: See *Whall v. Converse*, 146 Id. 345.

In the case at bar, nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that because the testator has not imposed all possible restrictions the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees

fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford v. Lackland*, 2 Dill. 6, a beneficiary who would have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether a creditor or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out: *Russell v. Grinnell*, 105 Mass. 425; see *Toner v. Collins*, 67 Iowa, 869; 56 Am. Rep. 346; *Rhoads v. Rhoads*, 48 Ill. 239; *Lent v. Howard*, 89 N. Y. 169; *Barkley v. Dosser*, 15 Lea, 529; *Carmichael v. Thompson*, Sup. Ct. Pa., Nov. 1, 1886; *Lampert v. Haydel*, 20 Mo. App. 616.

Decree affirmed.

TRUSTS AND TRUSTEES. — The beneficiary may often be entitled to a decree terminating the trust, and vesting the legal title in himself: *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320, and note; extended note to *Key v. Scates*, 78 Am. Dec. 406-410.

TRUSTS. — As to the validity of wills creating trusts, providing that property shall be enjoyed by the beneficiary, but not alienated by him or subject to the claims of his creditors: *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398, and extended note 405-406; *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 353, and note.

CARSON v. DUNHAM.

[149 MASSACHUSETTS, 52.]

INJUNCTIONS — RESTRAINING SUIT IN ANOTHER STATE. — Courts of one state will not restrain the prosecution of a suit pending in a sister state, which has jurisdiction of the subject-matter and of the parties, upon the ground that the decision of that court may differ from the decision of the court in the other state, or from the decisions of other courts of equal authority.

S. Bartlett and R. D. Weston-Smith, for the plaintiff.

J. F. Wiggin and B. M. Fernald, for the defendant.

MORTON, C. J. This court has, without doubt, the power to restrain a citizen of this commonwealth who is personally within its jurisdiction from prosecuting a suit in the courts of a sister state or a foreign country, when justice and equity require it.

In *Dehon v. Foster*, 4 Allen, 545, 7 Id. 57, the court, at the suit of the assignees of an insolvent debtor, enjoined a citizen of this commonwealth from prosecuting a suit in Pennsylvania against the debtor, in which his property was attached, because the effect of allowing the suit to go to judgment would be to give the attaching creditor a preference over the other creditors, and to defeat the operation of the insolvent law. The doctrine of this case was reconsidered and reaffirmed in *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657. Both of these cases proceed upon the ground, as stated by Mr. Justice Devens, that "the act of the defendants in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tends directly to defeat the operation of the insolvent law in its most essential features, to prevent a portion of the property of the debtors from coming to the assignees to be equally distributed among their creditors, and to obtain a preference for themselves; that the defendants, being citizens of this state, were bound by its laws, and could not be permitted to do any acts to evade or counteract their operation, the effect of which would be to deprive other citizens of rights which those laws were intended to secure."

But the general rule is, that where a case may be brought in either of two tribunals, that court which first obtains jurisdiction of the case retains it; and this extends, upon principles of comity, to cases of conflicting suits brought in the courts of sister states. This court, in the exercise of its judicial discretion, will not restrain the prosecution of such a suit, unless a clear equity is made out, requiring the interposition of the court to prevent a manifest wrong and injustice, or a clear waiver of our laws which should govern the rights of the parties.

In the case at bar, the defendant, Dunham, brought a suit in a court of competent jurisdiction in the state of South Carolina to foreclose a mortgage upon a plantation called Dean Hall, situated in that state. The history of the mortgage is as follows: William A. Carson, who owned Dean Hall, died in 1856, leaving a widow, the plaintiff in this suit, and two children. He appointed Robinson and Blacklock his executors, with authority to sell the property, and to hold the proceeds in trust for his widow and children. In 1857 the executor sold Dean Hall to one Ball, and took his bonds for thirty-five thousand dollars, secured by a mortgage of the plantation, most of which they held in trust for the widow and children. On May 7, 1863, Ball sold the property to Hyatt, McBurney, and Company, and Robinson, acting in the absence of his co-executor, received payment of the said bonds of Ball in confederate treasury notes. On May 8, 1863, Hyatt, one of the partners, sold to his copartners his interest in the firm of Hyatt, McBurney, and Company, and took, as part of the consideration, a mortgage for forty thousand dollars on Dean Hall. In July, 1886, the executrix of Hyatt assigned the said mortgage to Dunham, who, in August, 1886, brought the suit to foreclose it in the South Carolina court, as above stated. No personal service upon Mrs. Carson was made, but she appeared by counsel and defended the suit, "setting up as a defense all the facts alleged in the present bill."

If these were all the facts, it would seem to be clear that there was no ground for claiming that this court could properly interfere by injunction to restrain Dunham from prosecuting his suit. He had the right to bring his suit in the state court. A suit to foreclose the mortgage could only be brought in South Carolina. The land mortgaged is there, and most of the contracts which affect the rights of the parties were made there. The tribunals of that state, whose laws govern the title

to the real estate and the interpretation of the contracts, are the appropriate tribunals to determine the rights of the parties.

But it further appears that, in 1866, Mrs. Carson, to whom her children had assigned all their interest, brought a bill in equity in the circuit court of the United States for the district of South Carolina against McBurney and others, but in which Hyatt was not made a party, in which the prayer was that the bonds given by Ball might be declared valid and subsisting securities, and the mortgage to secure the same a subsisting lien on Dean Hall. The case went to the supreme court of the United States, and in that court a decree was rendered in favor of Mrs. Carson, as prayed for: *McBurney v. Carson*, 99 U. S. 567. In 1879 the executrix of Hyatt brought a suit to foreclose the mortgage to him in the state court of South Carolina. Mrs. Carson filed a petition to remove the case to the circuit court of the United States. This petition was overruled, and the supreme court of South Carolina, upon an appeal, sustained the jurisdiction of the state court, and rendered judgment for the plaintiff: *Hyatt v. McBurney*, 15 S. C. 393, 398; 18 Id. 199. Mrs. Carson took a writ of error to the supreme court of the United States, and also an appeal from a judgment of the circuit court refusing to remove the case. The supreme court decided that the circuit court had jurisdiction, and remanded the case for trial there; after which the case was dismissed upon motion of the plaintiff, and without any hearing upon the merits: See *Carson v. Hyatt*, 118 U. S. 279; *Carson v. Dunham*, 121 Id. 421.

The plaintiff in the suit before us contends that it thus appears that there is a difference of opinion between the supreme court of the United States and the supreme court of South Carolina upon the merits of the controversy between the parties; that the assignment to Dunham was colorable, and made for the purpose of enabling him to bring a suit in the state court which could not be removed to the United States court; and that these facts raise an equity in her favor which requires this court to enjoin Dunham from proceeding in his suit. It is the fair inference, from the evidence in this case, that Dunham desires to try his rights in the state court of South Carolina, because he supposes the decision will be favorable to him; and it is equally plain that Mrs. Carson is anxious to try her rights in the supreme court of the United States, or in this court, for the reason that she expects a decision in her favor.

But it does not appear that the transfer to Dunham was merely colorable. The justice of this court who heard the case has found that Dunham "became the absolute owner of said bond and mortgage." This being so, it is immaterial what his motives were for purchasing it. He had the right to enforce it in any competent tribunal. The supreme court of the United States has held that, even if the assignment to Dunham was colorable, it furnishes no ground for removing the case to the circuit court of the United States, and intimates that it is for the state court to decide whether this fact furnished any defense in the suit pending before it: *Carson v. Dunham*, 121 U. S. 421; *Provident Savings Society v. Ford*, 114 Id. 635; *Oakley v. Goodnow*, 118 Id. 43. But it is not necessary for us to consider what might be the effect of a merely colorable transfer, as it is found that the transfer to Dunham was valid, and not colorable.

We are then brought to the question, whether the fact, if it be a fact, that the supreme court of South Carolina entertains views of the law which governs the rights of the parties differing from those held by the supreme court of the United States justifies us in restraining Dunham from the further prosecution of his suit in the state court. The law gives the parties a choice of tribunals. Why is not Dunham's right to choose the South Carolina court as great as the right of Mrs. Carson to choose the United States court or the courts of this commonwealth? Reduced to its elements, the argument of the plaintiff is, that we should interfere, because there is danger that the supreme court of South Carolina will not rightly and justly decide the rights of the parties. We cannot yield to such an argument without a violation of every principle of interstate comity. As we have said, the general rule of comity is, that the court first acquiring jurisdiction shall retain it. In our judgment, it would be indefensible for the courts of this commonwealth to restrain the prosecution of a suit pending in the court of a sister state, which has jurisdiction of the subject-matter and of the parties, upon the ground that the decision of that court may differ from our own opinion, or from the decisions of other courts of equal authority. All the facts presented to us can be and are presented in the case pending in South Carolina, and it is presumed that the supreme court of that state will decide the case according to the law and the right.

For these reasons, without considering the merits of the

controversy between the parties, we are of opinion that this bill cannot be maintained.

Bill dismissed.

COMITY — INJUNCTION BY ONE STATE AGAINST SUIT IN ANOTHER. — A state has the right to restrain its citizens from bringing suits in sister states: *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657, and particularly note 663-666.

COMITY BETWEEN STATES REQUIRES ONE STATE to respect the laws and decisions of sister states, so long as they are not contrary to good morals, or repugnant to the policy of its own laws and institutions: Note to *Robinson v. Queen*, 10 Am. St. Rep. 698; *Donovan v. Pitcher*, 53 Ala. 411; 25 Am. Rep. 634; *Greenhow v. James*, 80 Va. 636; 56 Am. Rep. 603, and note.

OGDEN v. PATTEE.

[149 MASSACHUSETTS, 82.]

WILLS — LEGACY — COUPON BOND. — A specific bequest of a bond carries with it an overdue negotiable coupon physically attached to it at the time of the testator's death.

WILLS — LEGACY. — INTEREST must be allowed on a pecuniary legacy after one year from the testator's death, notwithstanding the fact that the will was not proved until six months after the expiration of the one year.

ACTION to recover interest on an overdue coupon attached to a bond specifically devised, and also to recover interest on a pecuniary legacy. The other facts are stated in the opinion.

D. C. Linscott, for the plaintiff.

A. Russ, for the defendants.

HOLMES, J. 1. The court is of the opinion that the specific legacy of the bond carried the bond in such form as the testator left it, and therefore, that if, as seems to be conceded, the overdue negotiable coupon was physically attached to it at the testator's death, the coupon passed with the bond.

2. The second count is for interest on a pecuniary legacy between August 10, 1886, one year from the testatrix's death, and May 25, 1887, the date when the legacy was paid. The defendants rely upon the fact, disclosed by the count, that the will was not proved until January 21, 1887. But interest "does not depend upon demand or default." It "follows as an accretion to the principal legacy": *Kent v. Dunham*, 106 Mass. 586, 591. The administrators will not be charged personally, and it may be presumed that the estate was receiving interest on the fund, although not in the administrator's

hands: See *Wood v. Penoyre*, 13 Ves. 326; *Sitwell v. Bernard*, 6 Id. 520, 539.

Judgment for the plaintiff.

WILLS — LEGACIES — INTEREST. — As to when executors and administrators can be charged with interest: Extended note to *Wells v. Walker*, 99 Am. Dec. 296-299. Interest upon legacies is payable only from the time they are actually due: *Curtis v. Adkins*, 1 Houst. 382; 68 Am. Dec. 422.

MIDDLESEX COMPANY v. McCUE.

[149 MASSACHUSETTS, 103.]

NUISANCE — SURFACE DRAINAGE AND CULTIVATION OF LAND. — The owner of land on the slope of a hill running down to a mill-pond on the land of another is not liable for filling such pond by cultivating, manuring, and surface-draining his own soil in the ordinary way, for the purpose of raising garden vegetables.

NUISANCE. — **DAMAGE TO LOWER PROPRIETOR** resulting from the usual and reasonable cultivation of his land by the upper proprietor is not ground for an action, but the lower proprietor may protect his land by building a wall upon it to prevent the damage.

B. F. Butler and P. Webster, for the plaintiff.

C. Cowley, for the defendant.

HOLMES, J. This is a bill brought to restrain the defendant from filling up the plaintiff's mill-pond. The master reports that the defendant's land is on the slope of a hill running down to the pond, and that the only acts of the defendant tending to fill the pond have been those of cultivating and manuring his own soil in the ordinary way, for the purpose of raising garden vegetables. The question is, whether the defendant has a right to do these acts, notwithstanding their effects upon the plaintiff's land and water rights.

The respective rights and liabilities of adjoining land-owners cannot be determined in advance by a mathematical line or a general formula, certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass: *Rideout v. Knox*, 148 Mass. 368; 12 Am. St. Rep. 560. Liability depends upon the nature of the act, and the kind and degree of harm done,

considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. A man may lose half the value of his house by the obstruction of his view, and yet be without remedy. In other cases his rights depend upon the degree of the damage, or rather of its cause. He must endure a certain amount of noise, smells, shaking, percolation, surface drainage, and so forth. If the amount is greater, he may be able to stop it, and to recover compensation. As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights.

The present case presents one of these questions of degree. If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact: *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line, and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc.: See *Brown v. Illius*, 27 Conn. 84; 71 Am. Dec. 49; 25 Conn. 583. In this case it complains, not that the substances brought down are offensive, but that the defendant causes any solid substance to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it, if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land: *Dickinson v. Worcester*, 7 Allen, 19; *Flagg v. Worcester*, 13 Gray, 601, 607; *Parks v. Newburyport*, 10 Id. 28; *Cassidy v. Old Colony Railroad*, 141 Mass. 174.

Bill dismissed.

NUISANCE. — The unlawful diversion or obstruction of water is an actionable nuisance: *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note; and mere delay, or even acquiescence in defendant's acts, short of a period of twenty years, necessary to give defendant a prescriptive right, will not bar plaintiff from maintaining an action to abate a dam, which causes an overflow, as an existing nuisance: *Mueller v. Fruen*, 36 Minn. 273.

DAWE v. MORRIS.

[149 MASSACHUSETTS, 188.]

PLEADING AND PRACTICE. — **DECLARATION IN TORT FOR DECEIT** does not state a good ground of action, which alleges that defendant, in order to induce plaintiff to enter into a contract to build a section of railroad, falsely represented that he had purchased certain rails at a price specified, and would sell them to plaintiff at the same price if he would make the contract; that, relying upon such representations as true, plaintiff made the contract; that defendant had not then purchased the rails, and did not sell, nor intend to sell, any rails so purchased to plaintiff, who, being thus induced to enter into the contract, was obliged to purchase a large number of rails at a much higher price than that named by defendant, to his great injury and damage.

FRAUD. — **REPRESENTATION, IN ORDER TO FORM THE GROUND OF AN ACTION OF DECEIT**, where one has been induced to act by reason thereof, must be one of some existing fact. A statement, promissory in its character, that one has purchased and will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any future event, is not properly a representation, but a contract, for a violation of which the remedy is by action thereon.

FRAUD. — **INJURY FROM FALSE REPRESENTATION**, in order to sustain an action of deceit, must be direct and material, and the probability or possibility that, because defendant had purchased at a certain price, the plaintiff would be able, or might believe himself to be able, from defendant's representation, to do so also, is too remote to support the action.

FRAUD — FALSE REPRESENTATIONS. — To sustain an action of deceit for false representations, it must be shown, not only that defendant has committed a tort, and that plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained.

F. A. Wyman and A. A. Wyman, for the plaintiff.

J. B. Warner and H. E. Warner, for the defendant.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland railway, are, that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. The plaintiff's declaration alleges that the

defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. If the formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the nature of deceit, because he was induced to enter into the contract with the Florida railway company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff: *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and immaterial. Had the defendant actually sold or had he been ready to sell the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that

himself could thereafter purchase them at the same price. But the injury from a false representation must be direct, and the probability or possibility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed a tort, and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained: *Lamb v. Stone*, 11 Pick. 527; *Bradley v. Fuller*, 118 Mass. 239. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said that if the plaintiff believed that the defendant had actually purchased the rails at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient": *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort: *Penn Ins. Co. v. Crane*, 134 Mass. 56; 45 Am. Rep. 282.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract, and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice

or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question, which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract, there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be, judgment for the defendant affirmed.

DECEIT. — In an action of deceit, it must appear that the fraudulent representations complained of were untrue, known to defendant to be untrue, and that they were calculated to and did actually deceive plaintiff: *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874.

FRAUDULENT REPRESENTATIONS. — Representations, to constitute fraud, must be as to material matters: *Lebby v. Ahrens*, 26 S. O. 275; as to existing, not future events: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; must not be mere expressions of opinions: *Chatham F. Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; *Nounnan v. Sutter County L. Co.*, 81 Cal. 1; *Doran v. Eaton*, 40 Minn. 35; must be false in fact: *Allison v. Jack*, 76 Iowa, 205; and known by the maker to be false: *Chatham F. Co. v. Moffatt*, *supra*; *Peterson v. Chicago etc. Ry Co.*, 38 Minn. 511; must deceive and have been made with intent to deceive: *Leowark v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40; *Lebby v. Ahrens*, 26 S. O. 275; *Bennett v. Gibbons*, 55 Conn. 450; *Wenzel v. Schulz*, 78 Cal. 221; *Lawrence v. Gayetty*, 78 Id. 126; 12 Am. St. Rep. 29, and note 36, 37; *Bustard v. Farrington*, 36 Minn. 320; and must be the proximate and immediate cause of the transaction which is sought to be avoided: *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202.

CROSSAN v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

[149 MASSACHUSETTS, 190.]

COMMON CARRIERS — FREIGHT OVER CONNECTING LINE. — Where, under a written contract with a carrier for the transportation of freight over his own and a connecting line for which he is not the agent, the shipper prepays the freight asked for the whole distance, but the amount paid over the connecting line is less than that fixed by its schedule, the latter has a lien for its additional freight, and, upon the arrival of the goods at their destination, may refuse to deliver them until it is paid, although it is shown the contract, and has notice from the way-bill that the freight asked was prepaid, and, under allegations of unreasonable delay in transportation, and subsequent detention, as matter in aggravation of the alleged wrongful refusal to deliver the goods, the plaintiff is not entitled to recover, in the absence of proof of unreasonable delay in transportation.

S. J. Thomas and C. P. Sampson, for the plaintiff.

W. C. Loring, for the defendant.

HOLMES, J. This is an action of trover for the conversion of nineteen horses. The horses were shipped by the plaintiff on the Pennsylvania railroad at Philadelphia for Boston, were delivered by that company to another at Jersey City, and were carried the last part of the way over the defendant's line. The plaintiff prepaid the freight demanded, which was forty-four dollars. But the Pennsylvania railroad, in making up the total, allowed only thirty-two dollars for carriage east of Jersey City instead of fifty dollars, as it should have done by the defendant's tariff, so that there were eighteen dollars still to be paid, if the defendant was to receive its usual rate.

At the time the defendant accepted the goods for carriage, it had notice of the contents of the way-bill, from which, perhaps, a jury might have inferred that a railroad agent versed in its abbreviations would have understood that there had been an attempt and an intention to prepay the freight. It had not seen the written contract between the plaintiff and the Pennsylvania railroad. This contract was shown to the defendant before the refusal of the latter to deliver. It contained the words, "Frt 44.00 prepaid," and also a promise by the plaintiff to pay the Pennsylvania railroad at the rate of twenty-two cents per hundred pounds, which would make the total forty-four dollars. On the other hand, it showed that the horses were to be carried to Boston, and it did not purport to bind the Pennsylvania railroad as a carrier for the whole

distance, but contemplated delivery to other carriers not specified. We are to take it, also, that the Pennsylvania railroad was not the agent of the defendant, as the plaintiff's counsel disclaimed that ground. When the horses arrived at Boston, the defendant refused to deliver them except upon payment of the amount unpaid, which is the alleged conversion. The verdict was for the defendant.

The question is, whether the defendant had a lien for the freight due to it according to its schedule and unpaid. The answer is not to be found in the letter of the document, but in general principles of law and considerations of policy. The plaintiff contends that the Pennsylvania railroad was a special agent, having no ostensible authority greater than that which he actually intended to give it, or at least that, if the defendant had notice that he had prepaid the freight demanded, it had notice that the Pennsylvania railroad had no authority to give it a lien for any further sum which the defendant might be entitled to demand. This view is not without sanction: *Marsh v. Union Pacific R'y Co.*, 3 McCrary, 236.

But we think that there are weightier considerations in favor of the defendant. Suppose that it had had the facts definitely before it, it would have seen, to be sure, that the plaintiff did not contemplate paying any more money, but it would have seen, also, that he did contemplate and desire that the horses should be carried through to Boston by a continuous and speedy passage. The existence of the latter expectation is confirmed by the plaintiff's declaration, and by his testimony. He was not entitled to have both his expectations made good by the defendant. An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way: *Potts v. New York etc. R. R. Co.*, 131 Mass. 455; 41 Am. Rep. 247. The forwarding agent, whatever its obligations to the plaintiff, only consented to be liable personally to the defendant for thirty-two dollars, but required the defendant to forward the goods. The defendant was not bound to carry for less than its full charge, if it had any right to do so. But if the demand to forward was authorized ostensibly, or by implication, that is to say if the carriage would give it a lien, it was liable to the plaintiff if it refused, except that it might demand prepayment. The plaintiff was not present, and it might take time and cost money to communicate with him; the horses were

perishable, and their keep would probably have cost more than the unpaid freight if they had been delayed; although we do not now decide whether these last facts make a difference in the law. If the plaintiff had a contract with the Pennsylvania railroad, that company could be made to indemnify the plaintiff in the place where the contract was made. Under such circumstances, there can be no doubt what course was most for the advantage of the owner, or what directions a prudent owner, if present, would give; and the analogies of the law would imply a corresponding authority in the defendant: *Knight v. Providence etc. R. R. Co.*, 13 R. I. 572, 576; 43 Am. Rep. 46; *Pierce v. Columbian Ins. Co.*, 14 Allen, 320, 323.

If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith (*Ireland v. Livingston*, L. R. 5 H. L. 395, 416), and would consider the necessity of an immediate decision: *Hawks v. Locke*, 139 Mass. 205, 209; 52 Am. Rep. 702. But the defendant does not need the aid of such considerations. Taking into account what we have said, and also that the defendant had a right to assume that the plaintiff knew that it was not bound by the Pennsylvania railroad's contract, and therefore knew that a higher rate might be demanded beyond the lines of that road than had been paid, we are of opinion that the defendant was justified in giving preponderance to the requirement of continuous and speedy carriage, and in assuming that the authority of the Pennsylvania railroad to offer the horses was not conditional upon the prepayment of freight by the plaintiff turning out to be full payment of all that the defendant could demand: See *Wolf v. Hough*, 22 Kan. 659; *Wells v. Thomas*, 27 Mo. 17; 72 Am. Dec. 228; *Vaughan v. Providence etc. R. R. Co.*, 13 R. I. 578, 581; *Schneider v. Evans*, 25 Wis. 241, 250, 261 et seq.; 3 Am. Rep. 56.

It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong place: *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246; 83 Am. Dec. 626; distinguishing *Robinson v. Baker*, 5 Cush. 137; 51 Am. Dec. 54; *Whitney v. Beckford*, 105 Mass. 267; *Patten v. Union Pacific R'y Co.*, 29 Fed. Rep. 590, disapproving *Fitch v. Newberry*, 1 Doug. (Mich.) 1; 40 Am. Dec. 33; *Vaughan v. Providence etc. R. R. Co.*, 13 R. I. 578. Yet in that case the

last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper.

A subordinate argument was suggested, that the plaintiff was entitled to go to the jury on the allegations of unreasonable delay in transportation and of detention of the horses upon the defendant's cars. But there was no evidence of unreasonable delay by the defendant after the horses were received by it, and the consequences of the detention after arrival are only alleged as matter of aggravation of the alleged wrongful refusal to deliver them. As the refusal was rightful, negligence in the care of the horses while detained, if any there was, cannot be relied on in this case as a substantive cause of action. It is plain, too, that the case was not tried on the footing of an action for negligence in rightful keeping, and the plaintiff acquiesced in that view of the case, and did not seek to amend. The questions of evidence are not argued by the plaintiff, and are sufficiently answered by the foregoing discussion.

Judgment on the verdict.

CARRIERS—LIEN FOR FREIGHT CHARGES.—Right of carrier to detain goods against the owner, where possession was not received from him: Note to *Fitch v. Newberry*, 40 Am. Dec. 44, 45; compare note to *Robinson v. Baker*, 51 Id. 58, 59.

LIEN OF CARRIER FOR FREIGHT CHARGES, GENERALLY: See *Pennsylvania R. R. Co. v. American Oil Works*, 126 Pa. St. 485; 12 Am. St. Rep. 885, and particularly note 888.

FILES v. BOSTON AND ALBANY RAILROAD COMPANY.

[149 MASSACHUSETTS, 204.]

CONTRIBUTORY NEGLIGENCE—DAMAGES—INJURY FROM ATTEMPTING TO RIDE ON LOCOMOTIVE.—One who attempts to board a locomotive attached to a freight train on a railroad devoted exclusively to the transportation of freight, by invitation of the conductor, and for his own convenience, does not acquire the rights of a passenger, even if he has previously ridden on the locomotive by similar invitation, and has seen other servants of the corporation do the same, so as to recover damages for personal injuries, in the absence of proof that the conductor had general or special authority to take plaintiff or other passengers on his engine.

CONTRIBUTORY NEGLIGENCE.—ONE WHO TAKES AN EXPOSED POSITION upon a train not designed for the use of passengers assumes the special risks of that position, whether he takes it by the license, non-interference, or express permission of the conductor.

B. Hall and J. F. Cronan, for the plaintiff.

Samuel Hoar, for the defendant.

DEVENS, J. The plaintiff, by invitation of the defendant's conductor of a freight train upon a railroad belonging to the defendant, and used entirely for the transportation of freight, was getting upon the locomotive-engine attached to the train in order to ride in the cab thereof, when the engine started, causing him to fall off and occasioning to him injuries, to recover damages for which he brings this suit. He had been to the office of the defendant's freight-agent to order cars for the use of the firm of which he was the shipping-clerk. He had at some previous times ridden back on the engine to his employer's yard, and it was sometimes necessary for him to direct where the freight-cars ordered should be placed in the yard on their arrival, but there was no evidence that there was any such necessity at the time of the accident. The plaintiff also testified that he had seen others, including the local freight-agent and a conductor, ride on the engine at various times.

Upon this evidence, the plaintiff contends that a usage was shown to carry back in the cab of the locomotive-engine from the local freight-office to his place of business the messenger ordering freight-cars, when such cars were sent at once, and that the defendant is thus responsible for the carelessness of its engineer or conductor in starting the locomotive-engine before he had fairly got upon it, even if the plaintiff was not to pay any fare. It may be conceded that, if the defendant had permitted the plaintiff to acquire the rights of a passenger, it would not be important that he was not to pay any fare: *Todd v. Old Colony and Fall River R. R.*, 3 Allen, 18; 80 Am. Dec. 49. There was no evidence of any malicious act or gross negligence on the part of the defendant's servants, and the question presented by the case is, whether one who attempts to get on board a locomotive-engine attached to a freight train on a railroad devoted exclusively to the transportation of freight, by invitation of the conductor, acquires the rights of a passenger, even if he has previously ridden on the locomotive by a similar invitation, and has seen other servants of the corporation do so. The defendant's railroad might properly be held responsible for acts done by the freight-conductor in the line of his duty, perhaps also for acts done by him in the apparent line of the duty intrusted to him, if such as one dealing with him

would be authorized to treat as done by authority of the company.

If a person takes an exposed position upon a train not designed for the use of passengers, he himself incurs the special risks of that position, whether he takes it by the license, non-interference, or even express permission of the conductor: *Hickey v. Boston and Lowell R. R.*, 14 Allen, 429; *Bates v. Old Colony R. R.*, 147 Mass. 255; *Torrey v. Boston and Albany R. R.*, 147 Id. 412.

In the case at bar, the conductor had no general authority, so far as shown, to take passengers on the locomotive-engine, or any special authority to take the plaintiff. The conductor was not only in charge of a freight train, but on a road intended solely for the transportation of freight. The locomotive-engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risks of so doing, whether he did so by the license or on the invitation of the conductor. It was not within the apparent scope of the freight-conductor's authority to permit persons to ride on his freight train, far less on the locomotive-engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight-agent and a conductor were known by the plaintiff to have ridden on the locomotive-engine, make the defendant responsible for accidents which occurred thereby: *Hickey v. Boston and Lowell R. R.*, 14 Allen, 429; *Merrill v. Eastern R. R.*, 139 Mass. 238; 52 Am. Rep. 705.

Judgment on the verdict.

CARRIERS OF PASSENGERS. — As to the rights of passengers upon freight trains: Note to *Central R. R. v. Smith*, 2 Am. St. Rep. 39, 40; and upon cars not intended for passengers: Note to *New York etc. R'y Co. v. Doane*, 7 Id. 457; *Rosenbaum v. St. Paul etc. R. R. Co.*, 38 Minn. 173; 8 Am. St. Rep. 653, and note 656; *International etc. R. R. Co. v. Cock*, 68 Tex. 713; 2 Am. St. Rep. 521; *Wallace v. Western etc. R. R. Co.*, 98 N. O. 494; 2 Am. St. Rep. 347, and note; *McGee v. Missouri P. R'y Co.*, 92 Mo. 208; 1 Am. St. Rep. 706, and note.

CONTRIBUTORY NEGLIGENCE. — One who remains upon the platform of a train, after being ordered by the train-hands to enter the car, assumes the risk of being thrown from the train, and upon receiving injuries thereby, is guilty of contributory negligence: *Louisville etc. R. R. Co. v. Biech*, 120 Ind. 549.

COMMONWEALTH v. TOLMAN.

[149 MASSACHUSETTS, 229.]

CRIMINAL LAW. — INDICTMENT for a malicious attempt to destroy a dam, which alleges that such dam is situated in a certain town, sufficiently describes its location.

CRIMINAL LAW — EVIDENCE. — On the trial of an indictment for a malicious attempt to destroy a dam, where the record of a superior court shows that it acted upon what purported to be a compliance with statutory provisions in authorizing the construction of the dam, such record is admissible in evidence, and proves compliance with the statutory requirements, in the absence of evidence to the contrary.

CRIMINAL LAW — EVIDENCE IN JUSTIFICATION. — On the trial of an indictment for a malicious attempt to destroy a dam erected under a statute providing that, in case the river should shoal below the dam after its erection, such shoaling must be removed by the proprietors thereof within a certain time, or upon their failure so to do, it must be removed by public authority at their expense, the defendant, if he admits the attempt to destroy the dam, cannot justify his act, nor excuse the alleged malice, by evidence that he earned his livelihood by fishing, and that for many years prior to the erection of the dam he had used, and had a right to use, the river for such purpose; that on account of the erection of the dam, the river has shoaled, and has been rendered unnavigable; that such shoaling had not been removed as required; that these facts were well known to him, and that it was matter of common conversation in the neighborhood that the dam was a public nuisance which any man had a right to destroy. Defendant's only remedy in such case is to seek to enforce the provisions of the statute in regard to the removal of the shoaling in the river.

PLEADING AND PRACTICE. — Under a general exception or objection to a charge, one cannot be allowed to select afterwards particular phrases, and found special exceptions thereon.

A. J. Waterman, attorney-general, and H. C. Bliss, first assistant attorney-general, for the commonwealth.

B. W. Harris and H. Kingman, for the defendant.

DEVENS, J. The defendant was tried and found guilty upon two indictments. The first indictment charged him with willfully and maliciously attempting to destroy a certain part or portion of a town-way legally laid out and established in Marshfield, the property of the inhabitants thereof, by malicious means therein set forth. A second indictment in its first count alleged similar acts to have been done by the defendant in the attempt and with intent to injure and destroy a certain dam situated in the town of Marshfield, and the property of the inhabitants of Marshfield. The second count of the second indictment alleged the same attempt with the same intent upon the same dam, but averred the property of

the dam to be in certain trustees. Upon both of these counts the defendant was convicted. This latter indictment contained a third count for a like attempt to destroy a public bridge; but as upon this the court directed a verdict for the defendant, it need not be here considered. Both indictments in all their counts alleged the failure of the defendant fully to complete his offense by the destruction, either wholly or partially, of the way or dam.

It is a general principle that, when a consummated offense is indictable, attempts which, if successful, would have resulted in such offense, are also indictable. The acts alleged, if done by the defendant, would have formed a part of the series which would have constituted an actual commission of the offense if it had been fully completed: Pub. Stats., c. 210 sec. 8. Many of the objections and exceptions taken apply to all the counts upon which he was convicted; but for reasons which will hereafter appear, we have preferred to consider only those which relate to his conviction on the second count of the second indictment.

This count alleged the property in the dam to be in certain trustees named, and to this allegation the defendant made no objection, either by motion to quash, exception, request for ruling, or otherwise. He filed a motion to quash, applicable to this count, upon the ground that the location and situation were not described with proper accuracy. The dam was alleged to be situated in the town of Marshfield, and this was sufficient. In indictments for keeping or maintaining as a nuisance a particular building, it has often been held that its location need not be specifically described, and that it is sufficient if it is alleged to be in a certain town named: *Commonwealth v. Logan*, 12 Gray, 136; *Commonwealth v. Welsh*, 1 Allen, 1; *Commonwealth v. Gallagher*, 1 Id. 592. So in an indictment for obstructing a way, and thus committing a nuisance, it was held that it was sufficiently described by averring it to be in a particular town, and, also, in an indictment for not repairing a highway, that it was not necessary to set out the *termini* of such highway: *Commonwealth v. Hall*, 15 Mass. 240; *Commonwealth v. Newbury*, 2 Pick. 51. The motion to quash was therefore rightfully overruled.

The Statutes of 1871, chapter 803, may, so far as is necessary for the questions we are discussing, be briefly summarized. The proprietors of Green Harbor Marsh, in Marshfield, were authorized, in section 1, to erect a dam and dikes at a

point specified, for the purpose of draining the marsh, and preventing the influx of the sea. These improvements were to be made under the direction of commissioners, to be appointed in the manner provided in the General Statutes, chapter 148: Pub. Stats., c. 189. Twenty of the proprietors were required to petition the superior court for the appointment of such commissioners, and full jurisdiction was given to it of all the proceedings, as provided in the General Statutes, chapter 148. Section 2 authorized the proprietors to manage their affairs as the proprietors of general fields. Section 3 provided that the county commissioners of Plymouth County might contract with commissioners appointed by the superior court for the erection of a highway, bridge, and dam, without a draw, at the joint expense of the county and the proprietors. Section 4, which is the one of most importance in the case at bar, provided that if shoaling should take place in the channel of Green Harbor River below the dam and dikes, said shoaling should be removed by the proprietors, under the direction and to the acceptance of the harbor commissioners; and that if the proprietors should fail to remove said obstructions for six months after notice, the commissioners should cause the obstructions to be removed at the expense of the proprietors, who were made liable to the commonwealth for the expenditure thus incurred, in an action of contract.

There was evidence that, by virtue of proceedings in the superior court, a dike or dam was built across Green Harbor River, which was completed in 1872, and was so constructed, with a sluice-way and gates, as to prevent the flow of the salt water onto the marsh above the dike, and to permit the fresh water to flow through the same when the tide turned and was ebbing, or to retain the fresh water to irrigate the meadows above, although in fact it was not used for the last purpose. The dam or dike was constructed across a part of the river, which was seventy feet wide at high water, and then navigable for small vessels, and entirely obstructed navigation above the same. There was further evidence that the defendant had caused to be prepared a large tin can containing fifty-two pounds of Atlas powder or dynamite; that there were inserted therein two time-fuses, connected with the cartridges, into which the powder had been divided, and that with this can the defendant went upon the dam in the night-time, near the sluice-way, with the intention of exploding the contents of the can on or under the dike, and of destroying the same, when

he was arrested; and it was admitted at the trial that he was in the act of attempting to blow up the dike.

The defendant contends that, upon the evidence in the case, the commonwealth failed to prove that the structure which he was charged with attempting to destroy was a dam, within the meaning of the Public Statutes, chapter 203, section 85, and that an instruction to this effect should have been given. No argument has been founded, nor could any properly have been founded, upon any distinction between the words "dam" and "dike." This contention rests on the position that the commonwealth—which had shown that the superior court had acted upon what purported to be the petition of twenty proprietors of the marsh-lands, had heard this petition, and had passed upon and decided it by appointing commissioners, and ordering them to erect the dam, which had been done, and a report of their doings made and accepted—must show further that the petition was in fact signed and presented by twenty proprietors; and that until this was done, no part of the record of the proceedings was admissible. The superior court is a court of general jurisdiction, upon which was conferred, as may be presumed from its public importance, a jurisdiction in regard to the special proceedings for the erection of this dam. It was to act upon the petition of twenty proprietors, and it was competent to decide for itself whether it had been thus addressed. By its action its record shows that it had decided that the proceedings had been thus initiated, and no further evidence was necessary. Whether its adjudication on this point would not have been conclusive, had the defendant sought by any evidence to controvert it, we have no occasion now to decide: *Commonwealth v. Carr*, 143 Mass. 84.

The defendant further relied upon a justification of the acts done by him, and offered evidence that "since the construction and completion of the dike shoaling had taken place in Green Harbor River, and its approaches below the dike, above the level of mean low water, to such an extent as to practically make Green Harbor River and its approaches unnavigable; that such shoaling was caused by the dike; that prior to the completion of the dike, Green Harbor River and its approaches were navigable, and for more than a mile above the dike; that the proprietors of Green Harbor Marsh were duly notified by the harbor commissioners, by notice dated September 13, 1876, to remove such shoaling; that no part of such shoaling had, at the time of the alleged offense, been removed"

by said proprietors, or any other party; that such shoaling is, because of the existence of such dike, constantly increasing; that the defendant was an inhabitant and resident of Green Harbor village, knew all of the facts stated in the foregoing offer, earned his livelihood by carrying on the business of fishing, and for this purpose had, for many years prior to the erection of the dike, used, and had the right to use, Green Harbor River and its approaches." The presiding judge declined to admit the evidence offered as a justification of the acts of the defendant, and ruled that "the act of the legislature and the proceedings thereon contemplated as one of the results of the erection of the dike a shoaling of the river, and that the shoaling of the river, and the purpose of the legislature to open certain benefits for agricultural purposes in one direction, to the injury of certain other public interests in the way of navigation, gave no right to the parties who had interest in navigation to defeat the purpose of the legislature in the matter of this provision for agriculture."

The contention of the defendant at the trial and in the argument of the case at bar is, that "the act of 1871, chapter 803, when accepted and acted upon by the proprietors of Green Harbor Marsh, became an executed contract between such proprietors and the commonwealth, by the terms of which both parties were bound; and the proprietors, upon proper notice, were bound to remove any and all shoaling above the level of mean low water, in Green Harbor River and its approaches, caused by such dike, and if they did not remove such shoaling, forfeited the right to keep and maintain such structure, and said dike became and was a nuisance; and any person having the right to use or navigate Green Harbor River or its approaches would have a right to abate such nuisance, and remove said dike."

The reasons upon which it has been held that when a party suffers an immediate injury from an obstruction in the highway, as from a gate erected thereon wrongfully, he may remove it in order to pass, have no application to a case such as the one at bar. The dam had been lawfully erected upon proceedings had under the statute, and had been constructed by the authority of the legislature, which, anticipating that one of the results might be the shoaling of the river below the dam, had provided a full and adequate remedy against this by imposing upon the proprietors a certain duty in relation thereto, and, in case of a failure on their part for a certain

length of time, upon a body of the public authorities, the harbor commissioners, representing the commonwealth, for whose expenditure the proprietors were afterwards bound to reimburse the commonwealth. The ground upon which a party may sometimes act in the removal of a nuisance, that in the exercise of his right he cannot wait for the slow processes of law, has here no application.

The injury which the defendant sustained, in being unable to use the stream below, was immediately caused by neglect of the proper precautions for which the statute had provided, and which had resulted in the shoaling of the water. The remedy for this was, not to destroy the structure, but to enforce, through the proper authorities, the provisions of law by which this injury to navigation below the dam had been anticipated and guarded against. Nor, if we should concede the defendant's proposition that the proprietors would be indictable for a nuisance in failing to remove the shoaling occasioned by this bridge, would it by any means follow that one situated as the defendant claimed to be would be authorized to destroy it. A corporation which was authorized to maintain a bridge, and to keep it in safe and proper condition for use, might be indicted for failing to keep it in proper repair, but it could not, therefore, be rightfully destroyed by one who had occasion to pass over it: *Commonwealth v. Central Bridge Co.*, 12 Cush. 242, 244. Nor is any case presented here such as that of *Arundel v. McCulloch*, 10 Mass. 70, where a bridge, without any authority of law, had been erected across a navigable stream, and it was held that one having occasion to pass with his vessel might lawfully break through the same, doing no more damage than was necessary for his passage.

The structure in the case at bar did not become a wholly unlawful structure because the proprietors had neglected to perform an important but subordinate duty in its management, by the non-performance of which, and not by the dam itself, injury might result to persons situated as was the defendant. The provisions of the statute made to enforce the performance of this duty were ample. Even if the necessity had been immediate on the part of the defendant that the accumulation should be removed, it does not appear nor was there any evidence that the destruction of the dam would have enabled him at once to use the stream below the dam, or that at the time he had any occasion so to do. He was not then navigating the stream, nor was it shown that the removal of the

dam would have removed the shoaling. He sustained no special or peculiar damage different from that of the rest of the community.

While the presiding judge refused to receive the evidence above stated as a justification of the acts of the defendant, he ruled that, under the indictments, any evidence tending to show that the defendant believed that he had a right to do the acts charged was admissible. The defendant, if the facts offered do not constitute a justification, contends that they were admissible as tending to show cause for belief on the part of the defendant that he had a right to destroy the dam, and excepts to the ruling of the judge to receive them for this purpose. This contention is in effect that, if not a justification, such facts may at least afford an excuse for acts of the defendant, and meet the allegation of malice. When the facts offered fail to show that the defendant had any right to destroy the dam, and when the law must be presumed to be known to him, proof of such facts could have no tendency to show a belief that the law was different, or that his legal rights were different from those which actually existed. The question is, indeed, on this point, as to the state or condition of his mind and his honest belief; but to have this effect, and to be available as evidence on this point, they must be connected with evidence that on such a state of facts he had been advised, and thus honestly believed, that he had a right to destroy the dam, or with other evidence of a similar character. The defendant did not do this, and the evidence was properly rejected in this aspect of the case. Apparently the defendant sought thus to connect it by proof that it was a matter of common conversation in the vicinity of Green Harbor that the dike "was a public nuisance, and that any man had a right to destroy it." But he did not offer evidence of a common or public reputation to this effect, or that he had ever been so advised, or that any similar statement had ever been made to him, or in any conversation in which he participated. This evidence was, therefore, properly rejected.

In the charge of the presiding judge, the nature of the malice which the commonwealth was required to prove was clearly and fully explained to the jury, and accurately defined. Nor has the defendant insisted on any objection to this as a general statement, although he now excepts to a single remark made by the presiding judge, to the effect that, "when a man is doing something which he thinks he has an honest

right to do, he has no occasion for secrecy, he has no occasion for darkness, he has no occasion to hide; for he is acting in the belief that he is doing just what he has a right to do." If this remark is to be construed as anything more than a submission to the jury of the circumstances of the defendant's conduct as bearing on his alleged guilty purpose, or is for any other reason objectionable, the defendant did not at the time take an exception thereto, so that it might, if desired, have been more clearly limited, expressed, or explained. Under a general exception or objection to a charge, one cannot be allowed to select afterwards particular phrases and found special exceptions thereon: *Curry v. Porter*, 125 Mass. 94; *McMahon v. O'Connor*, 137 Id. 216; *Wright v. Wright*, 139 Id. 177. Some other exceptions were taken by the defendant at the trial, but they have not been insisted upon in argument, and, on examining them, we do not deem it necessary to discuss them.

As we are of opinion that the exceptions of the defendant must be overruled, so far as the second count of the second indictment is concerned, we have not deemed it necessary to discuss his exceptions so far as they relate solely to the first indictment, or to the first count in the second indictment. All the counts in both indictments are clearly but different descriptions of the same offense by which, if guilty, the defendant has incurred but a single penalty. In the first indictment, the allegation is the attempted destruction of a town-way, the property of the town of Marshfield; in the first count of the second indictment, of a dam, the property of the town of Marshfield. These allegations involve the questions whether a town-way had been, or could lawfully have been, laid out over the dam; and if so, whether such way could be described as of the property of Marshfield, and also whether the dam itself could be described as of the property of Marshfield. In the view we have taken of the conviction of the defendant under the second count of the second indictment, these questions are not now of importance in the case at bar, and are hardly more than speculative.

If we assume that all might be decided in favor of the defendant, it would not diminish the penalty to which he is exposed, and to which he may be sentenced by reason of his proper conviction under the second count of the second indictment. Nor if these questions were otherwise decided would it add to his liability. It is therefore a sufficient disposition of the case submitted to us by the report to hold that, on the

entry of a *nolle prosequi* by the commonwealth on the first indictment, and on the first count of the second indictment, there may be, on the second count of the second indictment, judgment on the verdict.

JUDGMENTS AS EVIDENCE. — Recitals of jurisdictional facts in judgments are conclusive: Extended note to *Melia v. Simmons*, 30 Am. Rep. 748-752. A judgment by default may be introduced as evidence in another suit, and although the record does not show a service of process upon the defendant therein, the court will presume the jurisdiction was acquired over the person of such defendant: *Weaver v. Brown*, 87 Ala. 533. A record imports absolute verity in all judicial proceedings of a court of competent jurisdiction: *Merritt v. Horne*, 5 Ohio St. 307; 67 Am. Dec. 298; but is not evidence of the facts recited therein, except as between the parties or their privies: *Wilson v. Campbell*, 33 Ala. 249; 70 Am. Dec. 586.

HAWKINS v. GRAHAM.

[149 MASSACHUSETTS, 284.]

CONTRACTS — CONSTRUCTION — SATISFACTORY COMPLETION. — Under a written contract to “furnish and set up in complete and first-class working order” a system of heating apparatus under certain expressed requirements, and if every portion of the buildings are not properly heated upon the completion of the system in accordance with the requirements, upon ten days’ notice thereof, and if they are not so heated within ten days thereafter, the entire system to be removed at the expense of plaintiff, and in the event of the satisfactory completion of the system in accordance with the requirements, the price to be paid “after such acknowledgment has been made by the owner, or the work demonstrated,” the satisfactoriness of the system and the risk taken by the plaintiff are to be determined by the mind of a reasonable man, by the external measures set forth in the contract, and not by the private taste or liking of the defendant.

S. Lincoln, for the plaintiff.

A. Hemenway and F. L. Washburn, for the defendant.

HOLMES, J. The only question in this case is, whether the written agreement between the parties left the right of the plaintiff to recover the price of the work and materials furnished by him dependent upon the actual satisfaction of the defendant. Such agreements usually are construed, not as making the defendant’s declaration of dissatisfaction conclusive, in which case it would be difficult to say that they amounted to contracts (*Hunt v. Livermore*, 5 Pick. 395, 397), but as requiring an honest expression. In view of modern modes of business, it is not surprising that in some cases eager

sellers or selling agents should be found taking that degree of risk with unwilling purchasers, especially where taste is involved: *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49; 83 Am. Rep. 351; *Wood Reaping and Mowing Machine Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *McClure Brothers v. Briggs*, 58 Vt. 82; 56 Am. Rep. 557; *Exhaust Ventilator Co. v. Chicago etc. R'y Co.*, 66 Wis. 218; 57 Am. Rep. 257; *Seeley v. Welles*, 120 Pa. St. 69; *Singerly v. Thayer*, 108 Id. 291; 56 Am. Rep. 207; *Andrews v. Belfield*, 2 Com. B., N. S., 779.

Still, when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant: *Sloan v. Hayden*, 110 Mass. 141, 143; *Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 782, 799; *Dallman v. King*, 4 Bing. N. C. 105.

By the written proposition which was accepted by the defendant, the plaintiff agrees, "in consideration of the sum of \$1,575, to be paid me upon the satisfactory completion of the following system of heating in your new mills, to furnish and set up. . . . in complete and first-class working order," certain things. Then follow conditions, tests, and other undertakings. Then "it is further declared that in the event of my not being able to properly heat every portion of the buildings in accordance with the requirements as above set forth," upon ten days' notice "that the buildings are not being properly and sufficiently heated, and I cannot so heat it in ten days thereafter," the plaintiff will remove the machines at his own expense. "In this event, no charges of any kind will be made by me on account of any of the aforesaid work; it being distinctly understood that the providing of the entire system is to be done at my own risk absolutely. In the event of the system proving satisfactory, and conforming with all the requirements as above provided for, the sum of \$1,575, as above provided for, to be paid me, after such acknowledgment has been made by the owner or the work demonstrated."

The last words, "or the work demonstrated," offer an alternative to the owner's acknowledgment. They imply that, if the work is demonstrated, it is satisfactory within the meaning of the contract, although the owner has not acknowledged it. The previous words, "and conforming with all the requirements," tend the same way. The ten days' notice contemplated is not a notice that the owner is dissatisfied, but that the buildings "are not being properly and sufficiently heated," and the right to give it is conditioned upon the plaintiff's "not being able to properly heat every portion of the buildings," etc. Taking these phrases with the test prescribed, that the system is "to readily as well as easily heat or raise the temperature at any point . . . to the temperature of seventy degrees (70°) Fahr. in the coldest weather that may be experienced," etc., we are of opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract; not by the private taste or liking of the defendant.

Exceptions overruled.

CONTRACTS MUST RECEIVE A REASONABLE CONSTRUCTION, which must be ascertained, if possible, from the language of the parties, at the time of the execution of the contracts: *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *Conwell v. Pumphrey*, 9 Ind. 135; 68 Am. Dec. 611; *Sanborn v. Neal*, 4 Minn. 126; 77 Am. Dec. 502; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324; *Hunter v. Anthony*, 8 Jones, 385; 80 Am. Dec. 333; *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478; *Grant v. Leach*, 20 La. Ann. 329; 96 Am. Dec. 403; and the reasonableness of a contract is for the jury: *Jensen v. Perry*, 126 Pa. St. 495; 12 Am. St. Rep. 888, and note; *Perin v. Parker*, 126 Ill. 201; 9 Am. St. Rep. 571.

CONTRACTS — MEANING OF SUCH WORDS AS "TO SATISFACTION," USED IN CONTRACTS. — A contract for a portrait "to be satisfactory" to the customer gives him the right to refuse it at his pleasure: *Gibson v. Cranage*, 39 Mich. 49; 33 Am. Rep. 351; to the same effect is *Zaleski v. Clark*, 44 Conn. 218; 26 Am. Rep. 446; *Wood Reaping Machine Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; *Brown v. Foster*, 113 Mass. 136; 18 Am. Rep. 463. For when an entire contract is broken by one party, the other party may or may not enforce the contract at his option: *Dunn v. Daly*, 78 Cal. 640. But when there is any uncertainty or ambiguity in a contract, it must be construed against the contractor, and in favor of the contractee: *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 589; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337, and note. So where plaintiffs agreed to furnish their subscribers an "illustrated history," etc., which should contain "a map of the city of New Haven, showing ward boundaries, location of streets, parks, cemeteries," etc., they were bound to furnish a substantially accurate, though not absolutely correct, map: *Munsell v. Baldwin*, 56 Conn. 522.

PEOPLE'S ICE COMPANY v. DAVENPORT.

[149 MASSACHUSETTS, 322.]

ICE — TITLE TO ICE ON GREAT POND is in the public, and an individual cannot appropriate a part thereof by scraping the snow from it, and setting up stakes, so as to maintain his action against one who, five days thereafter, began to cut ice from the portion of the pond thus staked off.

TORT for conversion. Plaintiff and defendant were proprietors of ice-houses on a great pond, and had an equal and common right to take the ice from all parts thereof. Verdict for defendant. The other facts are stated in the opinion.

A. B. Wentworth, for the plaintiff.

J. E. Cotter, O. F. Jenney, and E. Davis, for the defendant.

MORTON, C. J. The plaintiff never was in the possession of the ice, for the value of which this suit is brought, after it was cut and severed from the real estate. It scraped off the snow from an area which covered about half of the pond, and put down stakes to show where the line of scraping was. It then suspended operations for at least five days before the defendant began to cut ice. The question is, whether this gave the plaintiff any title to the ice which it had thus scraped. We think it did not. It is too well settled to be disputed that the property in the great ponds is in the commonwealth; that the public have the right to use them for fishing, fowling, boating, skating, cutting ice for use or sale, and other lawful purposes; and that the owners of the shores have no exclusive rights in them except by a grant of the legislature: *Hittinger v. Eames*, 121 Mass. 539; *Gage v. Steinkrauss*, 131 Id. 222.

The right to cut ice is common to all the public. The plaintiff has this right in common with the rest of the public, but it cannot by its own act appropriate a part of the pond by scraping it, or setting up stakes, and exclude the public from it. The ice, until it is cut, remains a part of the realty, and no one has any exclusive title in it. There is no statute or other law which enables an owner of the shore, or any other person, thus to exclude the public.

In *Hittinger v. Eames*, *supra*, it appeared that the owners of the shore of Fresh Pond had, by an indenture, undertaken to divide the pond among themselves, and were accustomed, at the beginning of the winter, to scrape and mark off by stakes

their respective shares of the pond; but the court held that they could not thus exclude the public from taking ice.

The case of *Rowell v. Doyle*, 131 Mass. 474, is similar to the case at bar. There the plaintiffs had cleared off the snow, and were proceeding to make ready for harvesting the ice. The defendant cut several holes through the cleared ice for the purpose of fishing, and the plaintiffs sued him in an action of tort. The court held that the action could not be maintained, saying, in the opinion, that the plaintiffs "had the same right as others to cut and take ice which was the natural product of the pond; but that they had no right, to the exclusion of other public uses, to the occupation of any part of the pond for the purpose, by artificial means, of increasing the thickness of the ice. At the time of the acts of which they complain, they had not cut any ice, nor were they engaged in cutting, or otherwise in the actual possession of any; but they had suspended their operations for at least a day and two nights." If the plaintiffs had acquired any title to the ice which they had scraped, the decision must have been otherwise.

Upon the facts of the case at bar, we are of opinion that the plaintiffs had no title to or possession of the ice cut by the defendant which enables them to maintain an action of tort in the nature of trover.

The case is not like one of capturing animals *feræ naturæ*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of a part of the common estate by staking it off, and thus excluding his co-tenants.

Judgment on the verdict.

ICE — OWNERSHIP IN ICE. — The rule that ice belongs to the owner of the soil immediately thereunder is confined to ponds which are entirely upon one's own premises: *Bigelow v. Shaw*, 65 Mich. 341; 8 Am. St. Rep. 902, and note 907; compare *Woodman v. Pitman*, 79 Me. 456; 1 Am. St. Rep. 342, and note; *Lawson's Rights and Remedies*, sec. 1345; note to *Higgins v. Kusterer*, 32 Am. Rep. 164-168.

WOODMAN v. METROPOLITAN RAILROAD COMPANY.

[149 MASSACHUSETTS, 335.]

NEGLECT. — WHERE A CITY RAILROAD COMPANY is engaged in laying a track in a public street, and negligently leaves rails projecting beyond a temporary barrier inclosing the place where the track is being laid, it is liable in damages to one, who, traveling at night, and exercising due care, is injured by coming in contact with such projecting rails, notwithstanding the fact that the injury was sustained at other than a regular street crossing, and that the work was being done by an independent contractor.

TORT for personal injuries received through the negligence of defendant, a city railroad company, while crossing Adams Square, in Boston. Verdict for plaintiff. Exceptions by defendant.

R. M. Morse, Jr., and M. Morton, Jr., for the plaintiff.

M. F. Dickinson and G. D. Braman, for the defendant.

HOLMES, J. The plaintiff's testator was injured by a fall in the street. He was seen to fall, and was picked up senseless at a point where some rails projected beyond a temporary barrier inclosing a place where the defendant was having a track laid. There was no evidence of any other possible cause of the fall. This warranted a finding that he tripped over the end of the rails.

The street was a public highway, and the jury very properly might find that it was negligent to allow the ends of the rails to project beyond the barrier, especially if they believed that it was dark at the place, as one witness testified, although the weight of the testimony looks the other way on paper.

There was testimony that the plaintiff's testator was walking in the usual way just before he fell. Taking into account what he had a right to assume with regard to that part of the street which was not inclosed by barriers, the jury was warranted in finding that he was using due care: *Learoyd v. Godfrey*, 138 Mass. 315, 324; *Lyman v. Hampshire*, 140 Id. 311, 314. Indeed, if they believed that it was dark, they might have considered that the testator had been led into a trap. It is suggested that he was not crossing at a regular crossing. But his rights were not changed by a slight change in the pavement. He had a right to cross where he chose, if the jury thought that he used due care: *Raymond v. Lowell*, 6 Cush. 524; 53 Am. Dec. 57; *Gerald v. Boston*, 108 Mass. 580.

It is argued that the work was done by an independent contractor. Assuming that there was evidence warranting that conclusion, we are of opinion that the fact would not exonerate the defendant. In some cases a party is liable notwithstanding the intervention of an independent contractor lawfully employed. A plain case is when he is made personally responsible by statute for the prevention of the cause of the damage complained of: *Gray v. Pullen*, 5 Best & S. 970. Thus it is settled in many states that a city charged with the duty of keeping the streets in repair is answerable for an improperly guarded excavation made by a contractor; for instance, in building a sewer: *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Birmingham v. McCary*, 84 Ala. 469; *Logansport v. Dick*, 70 Ind. 65; 86 Am. Rep. 166; *Houston etc. R. R. Co. v. Meador*, 50 Tex. 77; *Circleville v. Neuding*, 41 Ohio St. 465, 469; *Baltimore v. O'Donnell*, 53 Md. 110; *Robbins v. Chicago*, 4 Wall. 657, 679; *St. Paul Water Co. v. Ware*, 16 Id. 566. In the present case it would not stretch the words of the public statutes and of the defendant's charter very much to say that such a personal duty was imposed upon it: Pub. Stats., c. 113, sec. 32; Stats. 1853, c. 353, sec. 3. See *Quested v. Newburyport etc. Horse R. R. Co.*, 127 Mass. 204; *Osgood v. Lynn etc. R. R. Co.*, 130 Id. 492; *Brookhouse v. Union R'y Co.*, 132 Id. 178; *Braslin v. Somerville Horse R. R. Co.*, 145 Id. 64.

But further, apart from statute, if the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs: *Sturges v. Cambridge Theological Education Society*, 130 Mass. 414; 39 Am. Rep. 463; *Stewart v. Putnam*, 127 Mass. 403, 407; *Gorham v. Gross*, 125 Id. 232, 240; 28 Am. Rep. 234; *Bower v. Peate*, 1 Q. B. Div. 321, approved in *Dalton v. Angus*, 6 App. Cas. 740; 4 Q. B. Div. 162; and 3 Id. 85; *Pickard v. Smith*, 10 Com. B., N. S., 470; *Hole v. Sittingbourne etc. R'y Co.*, 6 Hurl. & N. 488, 500; *Circleville v. Neuding*, 41 Ohio St. 465.

Laying the track for the defendant necessitated the digging up of the highway and the obstruction of it with earth and materials. This obstruction would be a nuisance unless prop-

erly guarded against. The work was done under a permit issued to the defendant. Considering the general principle of the law, and also the special relations of horse railroads to the highway, and the policy of the statutes, so far as the legislature has expressed itself upon the subject, we are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created: *Veazie v. Penobscot R. R. Co.*, 49 Me. 119, 123. See also *Darmstaetter v. Moynahan*, 27 Mich. 188.

Exactly how far this principle shall be carried is a question of nicety. But, on the whole, we are of opinion that the present case falls within it, and does not resemble those where the cause of injury was an application of force to the person or property of the plaintiff by a transitory act, or by a defect in machinery.

Exceptions overruled.

OBSTRUCTIONS OF THE HIGHWAY. — Everybody has an equal right to the reasonable use of a highway, whether on land or water, and an unreasonable obstruction thereof is a public nuisance: *Harold v. Jones*, 86 Ala. 274. Where a sidewalk has become obstructed by snow, the mere falling and presence of the snow is notice of the obstruction to the city, and it must remove it within a reasonable time: *Foxworthy v. Hastings City*, 25 Neb. 133; and in the case of an alley obstructed by a railroad track improperly constructed there, the city, not the abutting property owner, must abate the nuisance and stop the injury: *Central etc. R. R. Co. v. Andrews*, 41 Kan. 370; the rule being, that a property owner, desiring to recover damages for the obstruction of a highway, must show that the damages suffered are peculiar to himself, and different from the damages generally sustained by the community at large: *Fairchild v. St. Louis City*, 97 Mo. 85; *Canman v. St. Louis City*, 97 Id. 92; *Rude v. St. Louis City*, 93 Id. 408. The obstruction of a street in an incorporated city or town is an indictable nuisance, and also one which any person sustaining special damages may abate in an action in equity: *Demopolis v. Webb*, 87 Ala. 659.

NEGLIGENCE. — **GRANTING A RIGHT OF WAY** to a street railway by a city does not create a liability against the city for damages occasioned by the acts or negligence of the street railway company in the exercise of the rights granted them by the city: *Sorenson v. Greeley*, 10 Col. 369; so, in the absence of a statute imposing such liability, a city is not liable for personal injuries occasioned by the negligence of the officers and servants of a corporation in leaving an excavation in the street unguarded by fencing or lights: *Arnold v. San José City*, 81 Cal. 618. Where a street railroad company was required by its charter to grade and keep in repair the surface of the street for a space of two feet on each side of its track, it is liable for an injury caused by the defective condition of the track; but, under the Connecticut statutes, the company must have written notice of the injury: *Fields v. Hartford etc. Co.*, 54 Conn. 9. Telegraph companies having the right to place lines in the streets of a city must use reasonable care only: *Ward v. Atlantic etc. ?*

Co., 71 N. Y. 81; 27 Am. Rep. 10. And one who constructs his building so as to endanger public travelers upon adjacent streets is liable for injuries thereby occasioned: *Smethurst v. Proprietors etc. of Congregational Church*, 148 Mass. 261; 12 Am. St. Rep. 550, and note; *Hannon v. Pence*, 40 Minn. 127; 12 Am. St. Rep. 717.

STOCK v. CITY OF BOSTON.

[149 MASSACHUSETTS, 410.]

NEGLIGENCE — PROXIMATE CAUSE — REMEDY. — Where a city, in constructing a sewer, negligently uncovers a water-pipe and leaves it exposed so that the water in it is allowed to freeze, thus cutting off the supply of a party with whom the city is under contract to furnish water, so that he cannot by the use of reasonable diligence obtain a supply from that or other sources, and is thereby injured, he may maintain an action of tort against the city for damages, and need not rely on his action on his contract, as the exposure of the supply-pipe is the proximate cause of the injury.

TORT for negligently exposing a water supply-pipe, thus causing injury to plaintiff. Verdict for plaintiff. Exceptions by defendant.

T. M. Babson, for the defendant.

E. B. Powers and S. L. Powers, for the plaintiff.

MORTON, C. J. The servants of the defendant, in constructing a sewer in Minot Street, uncovered a water-pipe running to the green-house of the plaintiff. The jury have found that they were negligent in leaving it exposed for several days in severely cold weather; that this caused the water in it to freeze, and thus cut off the supply of water of the plaintiff. While a city or town is not liable in tort for injuries caused by the plan or scheme of a sewer laid out by the board of aldermen, it is liable for the negligence of its servants in carrying out the plan in constructing the sewer: *Emery v. Lowell*, 104 Mass. 13; *Murphy v. Lowell*, 124 Id. 564.

The defendant contends that as in this case the water-pipe belonged to the city, and it had a contract with the plaintiff for his supply of water, his only remedy for the loss of water was upon such contract. The fact that the water-pipe belonged to the city is not material. It was in the use and so far in the possession of the plaintiff that, if a stranger unlawfully interfered with it to the injury of the plaintiff, he could maintain an action of tort: *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277; 12 Am. Rep. 697. We think that

the fact that the city had a contract with the plaintiff to supply him with water does not take away his right to sue in tort, even if the rule of damages is the same as in an action upon the contract. A mere breach of contract cannot be sued on as a tort, but for tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract: *Ashley v. Root*, 4 Allen, 504. Suppose a lessor, who has covenanted to keep the leased premises in repair, should tortiously fire a cannon near the premises, breaking the windows, and otherwise injuring them. It would not be an answer to an action of tort to set up that the plaintiff had an action on the covenants of the lease. He could pursue either remedy. In the case at bar, the tortious acts of the city had no connection with or reference to its contract. They were independent acts, which gave the plaintiff a right to an action of tort, even if he had (which we need not decide) a concurrent remedy upon his contract.

The defendant contends that the damages suffered by the plaintiff were too remote. The damages were caused because the plaintiff, after the water was cut off, was unable to furnish water to his plants, and to supply his boiler with water, so as to heat the green-house. In *Derry v. Flitner*, 118 Mass. 131, it is said: "One who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated."

In the case at bar, the natural consequences of the tortious acts of the defendant in leaving the pipe exposed were, that the water in it froze, the supply of the plaintiff was cut off, his means of furnishing water to the plants and heat to his boiler were destroyed, and his plants were killed. The jury have found that this happened without any negligence on the part of the plaintiff, as he could not, by the use of reasonable diligence, obtain a supply of water or heat from other sources. The case of *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, 12 Am. Rep. 697, is similar to the case

before us. There the defendant negligently ran a train over a line of hose belonging to a third party, which the plaintiff was using to extinguish a fire in its factory. It was held that the severing of the hose was the proximate cause of the destruction of the building, and that the defendant was liable for its value. The instructions in this case were in accordance with the principles we have stated, and were correct.

Exceptions overruled.

PROXIMATE CAUSE. — No one can recover damages, actual or exemplary, from a railway company on account of negligence, unless such negligence actually causes him to sustain injury: *Missouri P. R. R. Co. v. Shuford*, 72 Tex. 165. The act of a defendant, to constitute an actionable tort, must be the proximate cause of some injury sustained by plaintiff: *Spicer v. Lynn etc. R. R. Co.*, 149 Mass. 207. No negligence, to be actionable, or to constitute a good defense as contributory negligence, must be the proximate cause of the injury complained of: *Dickson v. Hollister*, 123 Pa. St. 421; 10 Am. St. Rep. 533, and note.

PROXIMATE CAUSE. — As to the law of proximate cause generally: Note to *Brown v. Chicago etc. R'y Co.*, 41 Am. Rep. 53-58; note to *Forney v. Goldmacher*, 42 Id. 390-393; and for instances of: Note to *Campbell v. City of Stillwater*, 50 Id. 569-574; note to *White v. Conly*, 52 Id. 157-166; *Olsen v. City of Chippewa Falls*, 71 Wis. 558.

McINTIRE v. ROBERTS.

[149 MASSACHUSETTS, 450.]

DAMAGES FOR PERSONAL INJURY FROM UNGUARDED ELEVATOR-WELL. —

Where the opening in the wall of a building for access to an elevator from a street is outside the limits thereof, the owner or occupier of the building and elevator is not liable in damages to one who is injured by being pushed into and falling down the elevator-well, while the elevator is in use, in the absence of proof of negligence in such owner or occupier, or that the opening was not so constructed as to be closed by doors or proper barrier when the elevator was not in use.

TORT for personal injuries in being pushed into and falling down an unguarded elevator-well. Verdict for defendant.

J. A. Maxwell and J. D. McLaughlin, for the plaintiff.

A. Hemenway, for the defendants.

FIELD, J. It is plain that the opening in the wall of the building for access to the elevator from the street was outside the limits of the street, and that the plaintiff did not enter the building by any invitation of the defendants. The contention is, that the defendants were negligent in leaving this opening unguarded.

It is said of the liability of the city in *Alger v. Lowell*, 3 Allen, 402, 405: "The place where the plaintiff fell was indeed outside of the line of the street; but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for travelers in the use of ordinary care. And the city would have an undoubted right to erect such a railing, although it might obstruct the entrance to the passage-way of an abutter; because no person has a right to an open access to his land, adjoining a street, of such a character as to endanger persons lawfully using the street for purposes of travel."

In *Franklin v. Fisk*, 18 Allen, 211, 90 Am. Dec. 194, it is said: "When highways are established, they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travelers, and to use them for public travel, does not extend beyond the limits of the location. . . . The right of adjoining proprietors to erect structures upon their land up to the line of the highway is exercised everywhere." See *Mayo v. Springfield*, 136 Mass. 10.

If this elevator-opening rendered the sidewalk permanently dangerous to travelers, it was undoubtedly the duty of the city of Boston to put up a barrier, and if the defendants removed it they might be liable to travelers who were injured in consequence of its removal; but it has not yet been decided in this commonwealth that at common law abutters are liable to travelers for injuries received in consequence of excavations made in their land outside the limits of a highway; and *Howland v. Vincent*, 10 Met. 371, is a stronger case for the plaintiff than the case at bar. It is argued that that case is opposed to the weight of authority elsewhere, and that a hole outside the limits of a highway, yet so near to it as to make the highway unsafe for travelers, constitutes a public nuisance, and that if a person creates a public nuisance he is liable to individuals for any special damage suffered therefrom: See *Barnes v. Ward*, 9 Com. B. 392; *Fisher v. Prowse*, 2 Best & S. 770; *Hadley v. Taylor*, L. R. 1 Com. P. 58; *Beck v. Carter*, 68 N. Y. 288; 23 Am. Rep. 175; *Bond v. Smith*, 44 Hun, 219; *Murray v. McShane*, 52 Md. 217; 36 Am. Rep. 367; *State v. Society for Establishing Useful Manufactures*, 42 N. J. L. 504; *Haughey v. Hart*, 62 Iowa, 96; 49 Am. Rep. 138.

The occupier of a building who negligently permits a private

way leading to it, which is under his control, to be in an unsafe condition by reason of an excavation or embankment so near to it as to make traveling on it dangerous, is liable for injuries received by any person who is lawfully using the way with due care: *Mellen v. Morrill*, 126 Mass. 545; 30 Am. Rep. 695; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485. But abutters on a public way have not control of the way, nor do travelers use a public way by invitation of the abutters.

In this commonwealth the obligation of a city or town to put up guards against pitfalls which are so near to a highway as to make it unsafe for travelers is similar to the obligation which it seems is imposed upon abutters by the English law. We are not aware that it has ever been decided here that excavations made by the owner of land outside the limits of a highway, but so near to it as to make it unsafe for travelers, constitute a public nuisance, for creating or maintaining which the land-owner may be punished; or that, in assessing damages for land taken for a highway, any allowance is made to the land-owner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out. If it be assumed that, when a building abuts upon a street, it is for the authorities of the city or town to determine whether the entrances into the building from the street are so constructed that they may be permitted to remain; and if it be also assumed that when entrances are permitted which are constructed so as to be closed when not in use, by doors or some other barrier, the occupier of the building is liable in damages to travelers upon the street if the doors are negligently left open or the barrier left down, whereby the street becomes unsafe and the travelers are injured, — still we are of opinion that the facts stated in the report do not show, or tend to show, negligence on the part of the defendants. It does not appear that the opening was not constructed so as to be closed with doors, or by a proper barrier, when the elevator was not in use. The stone sill was about three inches above the sidewalk, the opening was but five or six feet wide, and nearly at a right angle with the line of the sidewalk, and the wall of the building was about eighteen inches thick. It was impossible that any traveler using due care in the daytime should mistake the opening for a continuation of the sidewalk. The only danger was, that a person on the sidewalk might be pushed into the opening, as he might be pushed against the wall of the building, or against or through a window, or against a door.

The elevator at the time of the accident was in use for carrying up the iron castings which were being unloaded from the wagon which had been backed up against the curbstone of the sidewalk. The accident that happened was one that could not reasonably have been anticipated, unless the horse was vicious, or there was negligence in managing him, and it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings or were in control of the horse were servants of the defendants.

There was at the time of the accident no statute which prescribed the manner in which this opening should be constructed or guarded; for the Statutes of 1885, chapter 374, section 108, does not apply to elevator-openings through the wall of a building into a street, and the Statutes of 1888, chapter 367, section 3, had not then been passed. By the terms of the report the verdict is to stand.

NEGLIGENCE. — The owner or occupant of premises who maintains a private passage-way opening into his cellar or basement, within the limits of a street, is liable for any injuries which may occur, when by his acts or negligence such passage-way has become unsafe and dangerous to travelers upon the street: *Landru v. Lund*, 38 Minn. 538. The husband of the owner of city property, communication to which was through a dark passage-way, who, while personally overseeing repairs upon such property, caused a plank to be taken from such passage-way, leaving a hole beneath unguarded, into which a man who took offal from the premises fell, and sustained injuries, is liable for damages to one so injured: *Toomey v. Sanborn*, 146 Mass. 28. But a contractor who hires a carpenter to do the furring on a room is not bound to maintain artificial lights to prevent the carpenter from going out of the regular passage-way to the building, and will not be liable if he wanders in the darkness of the building and falls through unguarded openings: *Murphy v. Greeley*, 146 Id. 196. An action cannot be maintained against St. Louis City for an injury sustained from an unguarded pit existing near to an approach to its court-house: *Cunningham v. St. Louis City*, 96 Mo. 53. And a mere licensee must avoid patent dangers, at his peril, upon premises, such as an open pit, not concealed otherwise than by darkness: *Reardon v. Thompson*, 149 Mass. 267. Where a hotel-owner made an opening in a sidewalk for the passage of an elevator to carry baggage, and erected a guard of gas-pipe railing around it, and such railing became loosened, of which the hotel-owner had notice, he was liable to one in damages who, leaning against the railing, fell into the opening and was injured: *Hotel Ass'n v. Walter*, 23 Neb. 280. One engaged in repairing premises used as a lodging-house is liable to a lodger who is injured by materials negligently left in the pathway to the house in such a manner as to obstruct such pathway, and render it dangerous: *Donnelly v. Hufschmidt*, 79 Cal. 74. The keeper of a public place of business must keep his premises and passage-ways thereto in a safe condition, and must use ordinary care to avoid accidents to such persons as lawfully enter such premises on business; but this rule does not apply to such portions of the premises as are not used for business purposes, such as private por-

tions, to which the business public are not invited to enter: *Schmidt v. Bauer*, 80 Cal. 566. And so a land-owner, though not liable *ipso facto* for erecting and maintaining a barbed-wire fence upon or around his premises along a public highway, yet he must use ordinary care to see that his fence does not become a trap for passing animals, of the natural propensities of which he must take notice: *Loveland v. Gardner*, 79 Id. 318; *Sisk v. Crump*, 112 Ind. 504. In like manner, railroad companies must keep in a safe condition all their platforms, station-grounds, and the approaches from and to the same, to which passengers and others are invited in the due course of business: *Union Pacific R'y Co. v. Sue*, 25 Neb. 772; *Owen v. Louisville etc. R. R. Co.*, 87 Ky. 626.

CLEGG v. BOSTON STORAGE WAREHOUSE COMPANY.

[149 MASSACHUSETTS, 454.]

TROVER AND CONVERSION. — WHERE A WAREHOUSEMAN unlocks his warehouse upon the demand of an officer, and shows him particular goods of another stored therein, whereupon the officer attaches such goods under a writ in his hands, the warehouseman is not guilty of conversion, although the goods attached do not belong to the party named in the writ.

E. M. Johnson, for the plaintiff.

F. L. Hayes, for the defendant.

W. ALLEN, J. This is an action of tort against a warehouseman for the conversion of goods that belonged to the plaintiff, which were put in storage by him with the defendant. While in the defendant's warehouse, the goods were attached on a writ against a former owner of them as his property, and continued in the possession of the attaching officer under the attachment until they were replevied by another claimant. The conversion relied on is the delivery of the goods by the defendant to the attaching officer. It is conceded that the officer had no authority to attach them; and the question presented is, whether the facts stated show such delivery of the goods by the defendant as will constitute a conversion of them.

The goods were stored by the defendant in its warehouse, in a locked compartment, to which the defendant held the key. The attaching officer went to the warehouse with a writ of attachment against one Preston, and demanded access to the goods in order to attach them on the writ, declaring that they were the property of Preston. The defendant opened the door of the compartment where the goods were, and the officer took them on the writ. All the defendant knew in regard to the

ownership of the goods was that they had that day been delivered at the warehouse by a teamster, who ordered them to be stored in the name of Thomas Clegg, and there is nothing to show want of good faith or of due care on the part of the defendant, except the fact that it opened the door on the demand of the officer. The plaintiff relies on the rule that delivery of goods by a warehouseman to a person not authorized to receive them is a conversion: See *Lichtenhein v. Boston and Providence R. R. Co.*, 11 Cush. 70; *Hall v. Boston and Worcester R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783. It may be assumed that it is not necessary that there should be a manual delivery of the goods by the warehouseman, but that it is sufficient if they are taken from his possession by his permission,—if he voluntarily surrenders the possession of them.

In the case at bar, there was no actual delivery of the goods by the defendant; and the facts show that the taking was not by its permission, and that it did not voluntarily surrender the possession. If the goods had been taken by a stranger, under a claim of title, in the presence of the defendant's agents, without objection, the defendant might have been held to have permitted the taking; but it cannot be contended that a taking by legal process, by an officer of the law, into the custody of the law, was by the permission of the defendant, nor that the failure to resist or impede the officer was a voluntary surrender of the possession of the goods to him. It is true that the officer was liable as a trespasser to the owner of the goods; but it would not be, on that account, less true that he took them by virtue of his process, and not by the permission of the defendant, nor that the defendant, if it surrendered the possession to the officer, did it in submission to legal process, and not voluntarily: *Stiles v. Davis*, 1 Black, 101. In *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 213, in which it was held that a common carrier was liable on his contract as carrier for the failure to deliver goods that were taken from him under an attachment against a person not their owner, it is said: "In one sense, the property was in the custody of the law, so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use."

The fact that the defendant exposed the goods to the officer, on his demand, does not show that the taking by him was by

the permission or connivance of the defendant. The officer had a writ which authorized him to take the goods of Preston, and to break open doors for that purpose; he asserted his right, and declared his purpose to attach such goods in the warehouse in the defendant's possession as belonged to Preston, and demanded access to them. The defendant did not know whether the goods belonged to Preston or to the person in whose name they were stored, but that is immaterial. It was under no obligation, if it had the right, and it had no power, to prevent the opening of the door and the taking of the goods by the officer. The facts that it opened the door with the key, which was the only means of opening it without breaking, that it did not oppose or impede the officer in finding and taking the goods, or even that, on the demand of the officer, it pointed out to him the particular goods he was in search of, do not show any intention to give permission to the officer to take the goods, but submission to the legal process, and to the authority claimed and exercised by the officer under it.

The fact that, while the goods were in the possession of the officer under the attachment, he did not remove them from the defendant's warehouse, but stored them there in charge of a keeper, and paid storage therefor to the defendant, does not show a conversion of the goods by the defendant.

On all the facts, we see no ground on which the defendant can be held liable.

Judgment affirmed.

CONVERSION. — As to what constitutes conversion: Note to *Hale v. Ames*, 15 Am. Dec. 151-153. Misdelivery of property by a bailee to an unauthorized person is of itself conversion: *Hall v. Boston etc. R. R. Corp.*, 14 Allen, 439; 92 Am. Dec. 783, and note. Conversion, at common law, is a tort committed by one who deals with the chattels of another inconsistently with the latter's rights: *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184. The wrongful delivery of property by a common carrier is a conversion for which action of trover will lie: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301. Where the statute authorizes the holder of a seed-grain note, upon condition broken, to take the crop raised from the seed for which such note was executed and given, the holder of the note may maintain trover against a subordinate lien-holder who has converted the crop: *Nash v. Brewster*, 39 Minn. 530. It is conversion for a sheriff to sell corn growing in a field as the property of one to whom it does not belong: *Hamilton v. Ross*, 23 Neb. 630. But a disposition of property consented to by the owner thereof can never be conversion: *Griffin v. Bristle*, 39 Minn. 456; *Tousley v. Board of Education*, 39 Id. 419. Nor can a co-tenant maintain trover against his tenant in common, unless the act is tortious, and has the effect of actual

destruction to the common property so far as plaintiff's share is concerned: *Shearin v. Riggsbee*, 97 N. C. 216. An action of trover will not lie to recover the value of securities loaned by plaintiff to defendant, where it appears that the relation between the parties is merely that of creditor and debtor, and no wrongful appropriation or detention is shown: *Borland v. Stokes*, 120 Pa. St. 278.

GILES LITHOGRAPHIC AND LIBERTY PRINTING COMPANY v. CHASE.

[149 MASSACHUSETTS, 450.]

CONTRACTS — ACCEPTANCE. — PARTY IS LIABLE FOR THE PRICE OF PRINTING done under his order and subject to his "acceptance of a finished proof," where, after he has been furnished with a printed copy of his manuscript, he marks the proof "O. K.," with directions to "go ahead and print," and this, although after the whole matter is printed a material misprint is discovered therein, which was overlooked both by the printer and by himself, and made a material difference between the manuscript and the printed proof.

F. W. Proctor, for the plaintiff.

W. B. French, for the defendants.

W. ALLEN, J. This is an action of contract to recover the price of printing advertising cards for the defendants. The defendants gave to one Power, a soliciting agent of the plaintiff, an order for the printing of one million cards, at two dollars a thousand, from manuscript to be furnished by the defendants. The defendants afterwards wrote to the plaintiff as follows: "In reply to yours of the 11th inst., would say that the order given to Mr. Power was conditional, one of the conditions being that the order was subject to our acceptance of a finished proof, at which time the order was to be given in regular form. We write you this that there may be no misunderstanding in regard to the same." The plaintiff replied: "Will say that your order given conditional to the satisfactory proof was regular, as that is applied to all orders given in lithography." The defendants subsequently sent to the plaintiff the manuscript to be printed, and the plaintiff put it in print and sent a proof to the defendants, which was examined and returned by them to the plaintiff, marked "O. K.," to signify their approval of it, with directions to "go ahead and print." The plaintiff accordingly printed the whole number of cards ordered, and after they were printed the defendants discovered that a material misprint had been made by transposing

two words, so that the proof of the printed cards differed materially in meaning from the manuscript. The defendants refused to receive the cards. The plaintiff tendered them, and demanded payment.

The report finds that both parties were negligent in not discovering the mistake, and that the plaintiff was negligent in making it, but that finding does not seem to be material. We think that the contract of the plaintiff was to furnish cards according to the finished proof. The plaintiff was to put the manuscript in print, and submit a proof to the defendant, but the order for printing the cards was not to be given until the proof was accepted. The plaintiff was to furnish a sample of the printed card, and if it was satisfactory, the defendants were to order the cards according to the sample. If there was an error in the sample, the defendants were not obliged to accept it; but if they accepted it, and ordered the cards to be furnished, they must be taken, by the construction of the agreement, to have ordered cards corresponding to the sample.

Judgment for the plaintiff on the finding.

CONTRACTS — MISTAKES. — Equity will relieve against no ignorance of fact which the party could have ascertained by the exercise of due diligence: *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406; *Fahie v. Pressey*, 2 Or. 23; 80 Am. Dec. 401; for one may be estopped by misrepresenting facts which he did not know, but which he ought to have known: *Wienstein v. National Bank of Jefferson*, 69 Tex. 38; 5 Am. St. Rep. 23; although an estoppel in pais arises only when manifest justice with respect to the rights of another demand it: *Madden v. Louisville etc. R'y Co.*, 66 Miss. 258. Where one, by his words or conduct or negligence, causes another to believe a certain fact, and thereby induces him to act upon that belief and alter his previous condition, the former cannot deny the existence of such fact: *Tousley v. Board of Education*, 39 Minn. 419. A party cannot complain of his own carelessness: *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; compare *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587.

WAIVER. — That one has waived his rights by his words or conduct, it must appear that he spoke or acted with a knowledge of all the facts, nor can a waiver happen to one acting under a mere misapprehension of facts: *State v. Churchill*, 48 Ark. 426.

EDDY v. COFFIN.

[149 MASSACHUSETTS, 463.]

LANDLORD AND TENANT — RECOUPMENT. — In an action for use and occupation, the tenant cannot recoup the cost of moving during his term, caused by an alleged breach of his lease, if at the end of the term he would have been put to the same expense in moving.

JUDGMENT AS EVIDENCE. — In an action for use and occupation, the tenant cannot place in evidence a judgment in a summary process by a third person against the landlord, when no execution has issued on such judgment, and the tenant has received no notice from such third person, has not attorned to him, but has held undisturbed possession under the landlord, until the end of his tenancy.

ACTION ON CONTRACT WITH AN ACCOUNT ANNEXED, one item of the latter being for use and occupation of a room for two months and one half at thirty dollars per month. Defendant claimed that, under the terms of such contract or lease, he was to have the use of the room, steam-power to run his machinery, and an elevator, all for the above sum per month; that during the term plaintiff failed to furnish steam-power, and that he, defendant, was forced to move elsewhere to obtain it to fulfill contracts on hand; that for this breach of the contract he was entitled to recoup damages. The defendant offered in evidence the record of a landlord and tenant process brought against plaintiff by a third person for the possession of the premises in dispute. The record showed that judgment was rendered against plaintiff, but did not show that execution had ever issued thereon. Verdict for plaintiff. Exceptions by defendant.

P. H. Hutchinson, for the plaintiff.

C. H. Sprague, for the defendant.

HOLMES, J. Whether the defendant moved in July or in September, he would have had to pay the cost of moving his machinery. Therefore he cannot attribute that payment to the plaintiff's breach of contract, if there was one, in failing to furnish steam, and thus obliging him to go elsewhere before the end of his tenancy. The instruction that the defendant could not recoup for this item was correct.

The record of the recovery in the summary process by a third person against the plaintiff was rightly excluded. No execution had issued upon the judgment in that suit. The judgment alone did not disseise the plaintiff of the reversion. Indeed, so far as appears, it may not have been rendered until

after the defendant's term. As an adjudication of facts it was *res inter alios*. If it had not been *res inter alios*, it would not have shown that the plaintiff's title had terminated after the beginning of the defendant's tenancy at will. If the plaintiff's title did terminate, the defendant received no notice from the owner of the reversion, and did not attorn to him. The defendant held under the plaintiff undisturbed until the end of his tenancy, and must pay him: See *Coburn v. Palmer*, 8 Cush. 124.

Exceptions overruled.

LANDLORD AND TENANT. — Counterclaims between landlord and tenant: Note to *Woodruff v. Garner*, 89 Am. Dec. 489. When a landlord leads the tenant to believe that improvements placed upon the leased premises by him will be deducted from the rent, such improvements may be set up by way of counterclaim in an action for rent: *Gocio v. Day*, 51 Ark. 47; but it is only by virtue of the agreement of a landlord to pay for improvements that a tenant can recover their value: *Id.*; *Swift v. New Durham L. Co.*, 64 N. H. 53; for it is the duty of the tenant to make such improvements as will prevent waste, and any improvements he makes of a permanent character inure to the benefit of the landlord: *Smith v. Blindburg*, 66 Mich. 319; *Curtis v. Fowler*, 66 Id. 696.

STRATTON v. PHYSIO-MEDICAL COLLEGE.

[149 MASSACHUSETTS, 505.]

WILLS — CONSTRUCTION — GIFT — PUBLIC CHARITY. — A gift by will to a supposititious and non-existing corporation, by name, is not a public charity, and cannot be claimed by another incorporated institution of nearly similar name and nature, under the doctrine of *cy-pres*. Even if the supposititious donee was in existence at the date of the will, still the charity would terminate if the donee ceased to exist before coming into possession of the gift, and it would go to the heirs at law and next of kin of the testator, as undevised property.

A. A. Ranney and F. Ranney, for the plaintiffs.

A. Fiske and J. Wilby, for the Physio-Medical Institute.

H. C. Bliss, first assistant attorney-general, for the attorney-general.

HOLMES, J. This is a bill in equity, filed June 19, 1882, brought by the son and widow of John Stratton, who allege themselves to be his heirs at law, to obtain a decree that one fourth of the income of the residue under such will, directed by him to be paid to the trustees of the Physio-Medical College of Cincinnati, Ohio, be paid to the plaintiffs, on the ground that there is no such institution. The words of the

will are, "one quarter part of the net income is to be paid semi-annually to the trustees of the Physio-Medical College of Cincinnati, Ohio, to be used by the college for the promotion of the medical art, as believed in and favored by me during my lifetime, and in support of that institution, as the trustees thereof shall from time to time determine, the same to be paid to the treasurer of the institution duly authorized."

The master reports that the testator supposed that there was a corporation of the name used by him, of which one Curtis, at whose instance he gave the legacy, was president or director; that in fact there was no such corporation in existence at the testator's death, but that Curtis lectured and taught, alone or with others, under that name; and that Curtis's medical school was the one meant. This school ceased to exist at Curtis's death, in 1881.

The income is claimed by a corporation called the Physio-Medical Institute, established at Cincinnati. Assuming that it would be possible for that corporation to take a gift to the Physio-Medical College (*Hinckley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719, and *Tucker v. Seaman's Aid Society*, 7 Met. 188, 209), it could not do so in the absence of evidence appropriating to it a name which, on its face, denotes a different body: *Minot v. Boston Asylum and Farm School*, 7 Met. 416; *American Bible Society v. Pratt*, 9 Allen, 109. But the evidence has not that effect, and the master finds that the name in the will does not mean the Physio-Medical Institute. We do not think that the claim of this defendant had sufficient ground to warrant the allowance of its costs out of the fund.

The plaintiffs have argued that the income should not be applied *cy-pres*. The attorney-general, who has been made a party defendant, makes no argument that it should be so applied. The attempt of the Physio-Medical Institute to raise the question by an amendment to its answer was disallowed, and it did not seek to reopen the matter at the hearing before us. In the absence of argument, we see no sufficient reason for directing a scheme to be framed.

In the first place, it does not appear that the will creates a public charity. It does not purport to found an institution, as in *Tainter v. Clark*, 5 Allen, 66, *Attorney-General v. Lonsdale*, 1 Sim. 105, and *Russell v. Allen*, 107 U. S. 163, but to give the fund to one already in existence, and having a determinate character. It would seem that neither Curtis's medical school in fact, nor the supposed corporation in the mind of

the testator, was a free or public school, as in *Second Religious Society v. Harriman*, 125 Mass. 321, and *Morville v. Fowle*, 144 Id. 109 (see *McIntire v. Zanesville*, 17 Ohio St. 352), but that they were both private pecuniary enterprises, to the support of which the trustees, that is to say, the parties interested, had power to apply the whole income. Such an enterprise is not a public charity, even if indirectly it serves charitable ends: *Attorney-General v. Hewer*, 2 Vern. 387; *Attorney-General v. Newcombe*, 14 Ves. 1, 7; *Attorney-General v. Haberdashers' Co.*, 1 Mylne & K. 420; see *Drury v. Natick*, 10 Allen, 169, 180; *Carne v. Long*, 2 De Gex, F. & J. 75, 79; *Thomson v. Shakespear*, 1 Id. 399, 406, 408. If the will allows the fund to be applied to purposes not charitable, the gift fails as a charity: *Rotch v. Emerson*, 105 Mass. 431, 433; *Saltonstall v. Sanders*, 11 Allen, 446, 464; *Morice v. Bishop of Durham*, 9 Ves. 399, 406; *Ellis v. Selby*, 1 Mylne & C. 286, 299.

In the next place, we think that it appears from the facts that the gift is primarily to the trustees of the college, and that the college is in another state, that the income is to be used by the college, and that the whole of it may be used for its own support, in the discretion of the trustees, as well as from the circumstances under which the will was made, that the main object is the support of the particular institution which the testator had in mind, and that the promotion in Ohio of Thompsonianism, the form of medical art believed in by the testator, was to be accomplished as incident to that object. It is immaterial to this conclusion whether the name described an existing beneficiary or not. At least, it described an institution which was supposed by the testator to exist, and of which his friend was supposed to be an officer. The testator's belief as to facts has the same effect upon the construction of his language, whether his belief was right or mistaken.

Then, if the foregoing construction of the will is not too strict, even if the gift were to a public charity, probably the gift would fail upon the failure of the donee. The main doubt, if it were conceded that the gift was charitable, would arise on the question of construction. In such cases, courts have gone very far in discovering and sustaining a general charitable intent, distinct from the means indicated for carrying it out, or the immediate object: *Incorporated Society v. Price*, 1 Jones & L. 498; 7 I. R. Eq. 260; and other cases cited in *Jackson v. Phillips*, 14 Allen, 539.

Thus in case of a simple gift to an institution, if the insti-

tution is in its nature and by its name appears to be a mere trustee or conduit for the application of its funds to charitable purposes, the gift will not fail upon failure of the donee: *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. American Bible Society*, 2 Allen, 334; *Old South Society v. Crocker*, 119 Mass. 1, 24; 20 Am. Rep. 299; see *In re Maguire*, L. R. 9 Eq. 632. So, *a fortiori*, if the objects of the charitable trust are declared by the will, and it appears that the discretion of the particular societies named is not of the essence of the gift: *Reeve v. Attorney-General*, 3 Hare, 191, 197; *Marsh v. Attorney-General*, 2 Johns. & H. 61. But if the construction of the will is settled in the sense in which we have construed the one before us, then if the donee fails, the gift fails. To that extent, at least, we may follow the late English cases with safety, and without encountering the doubts expressed in *Jackson v. Phillips*, 14 Allen, 539, 594, and 1 Jarman on Wills, Bigelow's ed., 247, 248; *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Smale & G. 264; *Marsh v. Means*, 5 Week. Rep. 815; 8 Jur., N. S., 790; *Langford v. Gowland*, 3 Giff. 617; *Fisk v. Attorney-General*, L. R. 4 Eq. 521; *In re Maguire*, L. R. 9 Eq. 632; *Minot v. Baker*, 147 Mass. 348-350; 9 Am. St. Rep. 713; see *Cherry v. Mott*, 1 Mylne & C. 123, 133; *Smith v. Oliver*, 11 Beav. 481; *Coldwell v. Holme*, 18 Jur. 396, 397; Tudor on Charities, 2d ed., 255 et seq. And even if the donee is in existence at the date of the will, there is no absolute rule of law that prevents the charity terminating when the donee ceases to exist, although, no doubt, in such cases, courts have gone still further in straining the meaning of wills, in order to uphold the supposed general intent: *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Smale & G. 264; see *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Baker v. Clarke Institution*, 110 Mass. 88, 91. The favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift, whether the duration is limited in so many words or not.

As the fund in question is a part of the residue, it goes to the heirs at law and next of kin of the testator, as undeviseed property: *Sohier v. Inches*, 12 Gray, 385; *Lombard v. Boyden*, 5 Allen, 249; *Smith v. Haynes*, 111 Mass. 346; *Cummings v. Bramhall*, 120 Id. 552, 558; *Skrymsher v. Northcote*, 1 Swanst. 566, 570; *Humble v. Shore*, 7 Hare, 247, 249.

Decree for the plaintiffs.

CY-PRES DOCTRINE does not exist in New York, Kentucky, Pennsylvania, North Carolina, South Carolina, Alabama, Connecticut, Georgia, Indiana, Wisconsin, Virginia, or Iowa: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St.

Rep. 420; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Biscom v. Albertson*, 34 N. Y. 590; *Williams v. Williams*, 8 N. Y. 525; *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475, and note; *Cromie v. Louisville etc. House*, 3 Bush, 371; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; *McAuley v. Wilson*, 1 Dev. Eq. 276; 18 Am. Dec. 587; *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94; *Pringle v. Dorsey*, 3 Rich., N. S., 509; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 347; *Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; *Adams v. Bass*, 18 Ga. 130; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Heiss v. Murphy*, 40 Wis. 292; *Gallego v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 650; *Lapage v. McNamara*, 5 Iowa, 124; note to *Dashiell v. Attorney-General*, 9 Am. Dec. 583.

CARLETON v. RUGG.

[149 MASSACHUSETTS, 550.]

CONSTITUTIONAL LAW — JURY TRIAL, RIGHT TO. — A statute conferring jurisdiction in equity upon certain courts on information filed by the district attorney, or upon the petition of ten legal voters of any town or city, setting forth that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and declaring that such injunction may issue by any justice of either of the courts named, is constitutional, and does not violate the right of trial by jury, nor deprive an offender of his property without due process of law.

EVIDENCE. — IN AN ACTION under a statute conferring jurisdiction upon certain courts to enjoin or abate as a nuisance any building or place resorted to for the purposes of prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, upon the petition of ten of the legal voters of any town or city, it may be shown that the name "A. M. Allen" appearing upon such petition was signed by Augustine M. Allen, a legal voter of a certain city.

INJUNCTIONS — DISCRETION OF COURT. — In an action commenced under a statute conferring jurisdiction upon certain courts to enjoin or abate as a nuisance any building resorted to or used for certain illegal purposes, upon the petition of ten of the legal voters of any town or city, if the respondents admit the facts stated in the petition to be true, the presiding judge may, in his discretion, order a preliminary injunction to issue.

PETITION signed by ten of the legal voters of the city of Haverhill to have restrained, enjoined, and abated as a common nuisance a certain tenement used for the illegal keeping and sale of intoxicating liquors.

W. H. Moody, for the petitioners.

E. B. Fuller, for the respondents.

KNOWLTON, J. The Statutes of 1887, chapter 380, section 1, is as follows: "The supreme judicial court and superior court

shall have jurisdiction in equity upon information filed by the district attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction for such purpose may be issued by any justice of either of said courts."

The first question reported for our decision is, whether this statute is constitutional. The respondents contend that it is in conflict with article 12 of the declaration of rights, which provides that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers or the law of the land." The right of the legislature, in the exercise of the police power of the commonwealth, to pass laws regulating the sale of intoxicating liquors, or absolutely prohibiting it except for medicinal, mechanical, or chemical purposes, has been repeatedly asserted in able and elaborate opinions of this court and of the supreme court of the United States, which cover every question that can fairly be raised under the constitution of Massachusetts or under that of the United States: *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381; *License Cases*, 5 How. 504; *Bartemeyer v. Iowa*, 18 Wall. 129; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Mugler v. Kansas*, 123 Id. 623; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153.

We do not understand the respondents to contend that the provisions of the Public Statutes, chapter 100, which regulate the sale of intoxicating liquors, or those of the Public Statutes, chapter 101, section 6, which declare that "all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances," are unconstitutional. But the argument is, that by a process in equity for the abatement of an alleged common nuisance of the kind named in this statute, they are liable to be deprived of their property, immunities, and privileges otherwise than by the judgment of their peers or the law of the land.

The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are

entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance: *Attorney-General v. Hunter*, 1 Dev. Eq. 12; *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339; *Ewell v. Greenwood*, 26 Iowa, 377; *Minke v. Hopeman*, 87 Ill. 450; 29 Am. Rep. 63.

Apart from the method provided for instituting proceedings, the statute under consideration merely says that courts of equity shall have jurisdiction of this kind of public nuisances as they have of others. It authorizes the making of any reasonable order, or the issue of any proper process, adapted to the abatement or prevention of the nuisance. There can be no doubt of the constitutional right of the legislature to prescribe the agency to represent the public in setting the law in motion. That may as well be the district attorney of the district, or ten legal voters of the town where the nuisance is alleged to exist, as the attorney-general, if the legislature so determines: *Littleton v. Frits*, 65 Iowa, 488; 54 Am. Rep. 19; *Kansas v. Ziebold*, 128 U. S. 628.

It is urged that this statute makes no provision for a trial by jury. This objection applies as well to nearly all our legislation giving jurisdiction in equity. The Public Statutes, chapter 151, section 27, provides for a trial by jury in every case in equity in which that mode of trial is deemed by the court to be desirable. In cases in equity in which defendants have a constitutional right to such a trial, the courts secure it to them: *Powers v. Raymond*, 137 Mass. 483.

In the very recent case of *Kansas v. Ziebold*, *supra*, the supreme court of the United States fully considered all the constitutional questions which arise in the case at bar. In the law of Kansas in relation to nuisances of the kind we are considering is this language: "The attorney-general, county attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the

name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required": Comp. Laws Kan. 1885, c. 35, sec. 13. Then follow provisions for punishing disobedience of an injunction as for a contempt. The defendants were the owners of a brewery which was built before the passage of the statute, and was worth about ten thousand dollars if it could be used for brewing beer, but was of little value for any other use. Under the law, a building so used was a nuisance. A suit in equity was brought under the statute, alleging that the defendant's building was used for manufacturing intoxicating liquor, and praying that it might be abated as a nuisance. The defendants contended that the statute, if enforced, would abridge their privileges and immunities, and deprive them of their property without due process of law, and was in violation of the fourteenth amendment of the constitution of the United States. But in a very elaborate opinion, the court held otherwise, and sustained the constitutionality of the law in every particular. The statute made no provision for a trial by jury, and it seems that under the constitution of Kansas parties are entitled to a trial in that mode in all cases in which that had been the method of trial prior to the adoption of the constitution. The court held that a proceeding in equity to abate a nuisance without such a trial was "due process of law," because it had not been the custom to try such cases to a jury. Similar decisions have been made in Iowa and in Kansas: *Littleton v. Fritz*, 65 Iowa, 488; 54 Am. Rep. 19; *State v. Crawford*, 28 Kan. 726; 42 Am. Rep. 182.

In our state, the right to proceed in equity to abate public nuisances, and to destroy private property in the exercise of the police power, when necessary for the protection of the public, has been recognized in many cases: *District Attorney v. Lynn etc. R. R. Co.*, 16 Gray, 242; *Belcher v. Farrar*, 8 Allen, 325; *Winthrop v. Farrar*, 11 Id. 398; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; 6 Am. Rep. 227; *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694; *Bancroft v. Cambridge*, 126 Mass. 438. We are of opinion that the statute is constitutional.

It was competent for the petitioners to show that the person who signed the petition by the name "A. M. Allen" was Augustine M. Allen, who was a legal voter in the city of Haverhill: *Commonwealth v. Hamilton*, 15 Gray, 480.

The third question relates to the power of the justice, in the exercise of his discretion, to order a preliminary injunction. The principles by which the court should be governed, in dealing with an application for a preliminary injunction under this statute, are the same as apply to proceedings to enjoin other kinds of public nuisances. The ten legal voters who unite in a petition represent the public, as does the attorney-general in other similar cases. The fact that no one of them in the present case would suffer any damage by the continuance of the nuisance beyond that common to all law-abiding citizens was immaterial.

In all suits in equity, before a case can be regularly heard upon its merits, the defendant must have the reasonable time prescribed by the rule in which to answer; issues, whether of law or of fact, must be made up, and an opportunity given to prepare for the hearing. An application for a preliminary injunction rests upon the alleged existence of an emergency, or of a special reason for an order before the case can be regularly heard. It is only to prevent serious injury, for which there is no other complete and adequate remedy, that a court is justified in interfering with the conduct of persons or the use of property before trial. Properly to determine what shall be done in cases of this kind involves an exercise of sound discretion by the presiding judge, who should look to the interests of the petitioners, and of the public, whom they represent, and should at the same time remember that without good reason a respondent is not to be dealt with *ex parte*, nor forced to trial before the case is ripe for hearing. It should be borne in mind that this is not a statute which professes to look to the conduct of persons to prevent the commission of crime. If it were, it would have no legitimate place in our jurisprudence. There is no doubt that in hearings upon applications for preliminary injunctions and orders *pendente lite* in suits in equity, and in proceedings for the punishment of contempt of court, the parties have no constitutional right to a trial by jury. It would be an anomalous proceeding for a court to enjoin a defendant from committing the crime of larceny, or of selling intoxicating liquors, with a view to punish as disobedience of the injunction and contempt of court the same act which was before punishable as a crime. If that could be done, an accused person through a mere change of form in the proceedings might be punished for a crime without a trial by jury, and in violation of both the federal and state constitu-

tions. There would be strong ground for contending that a statute which should attempt to authorize such a method of preventing or punishing ordinary crimes would be unconstitutional. Indeed, even where a plaintiff seeks the aid of a court of equity to protect him from irreparable injury through the threatened publication of a libel, or the commission of some other like crime, the courts decline to interfere: *Brandreth v. Lance*, 8 Paige, 24; 34 Am. Dec. 368; *Fleming v. Newton*, 1 H. L. Cas. 363, 376; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310.

In proceeding under this statute, — not for the purpose of forbidding by order a personal act which the law forbids under the penalty of fine and imprisonment, but for the purpose of protecting the community from a harmful use of property, — courts, in determining whether to issue a preliminary injunction, should look to the nature of the building or tenement, and the use to which it is being put, and is likely to be put, to see whether the continuance of it will be seriously detrimental to the community before the rights of the parties can be finally determined. We can imagine a case in which a tenement might be alleged to be a nuisance by reason of its use for the unlawful sale of intoxicating liquors for medicinal purposes. Under the rules of practice in equity, it can hardly be contended that the court would be called upon to issue an injunction in such a case until the existence of the nuisance had been established at the final hearing. On the other hand, we can imagine a case in which a tenement used for the illegal sale of intoxicating liquors might be so situated and so kept that every day's continuance of it would inflict serious injury upon the people in its vicinity. In such a suit a court might well take measures to abate the nuisance upon a preliminary hearing.

In the case at bar, the respondents, for the purposes of the hearing, admitted that the allegations of the petition were true. By this admission, the principal reason for not granting an injunction before the final hearing was eliminated from the case. Usually there is a question of fact in dispute, of a kind which, at the request of either party, is commonly submitted to a jury. Indeed, it can be argued with much force, but whether effectually it is unnecessary now to decide, that upon this question as to the use made of the property the parties at the hearing upon the merits have a constitutional right to a trial by jury: See *Merchants' National Bank v. Moulton*, 143 Mass.

543. The respondents having conceded facts which, if proved at the final hearing, will require a decree in favor of the petitioners, it was within the power of the presiding judge, in the exercise of his discretion, to order a preliminary injunction.

Injunction to issue.

FIELD, J., wrote a dissenting opinion in this case, in which he maintained that the statute in question was unconstitutional. Justices Devens and Allen concurred. In discussing the question, he said, in effect, that it is quite evident that the statute in question was not passed for the protection of private rights; for, in proceeding under it, it is immaterial whether the use makes the building or place dangerous or offensive to the people or neighborhood, as the keeping or sale of liquor may be so secret that they know nothing about it, or, in fact, they may desire it. Still, these facts could not be interposed as a defense, because the statute was passed for the purpose of enforcing the policy of the state against the keeping or sale of intoxicating liquors. While this may be detrimental to the people at large, still the place where the liquors are kept or sold is not necessarily rendered dangerous to the health or safety of the people dwelling near, while the statute applies to any keeping of such liquors in any building or place with the intent to illegally sell them in any part of the state. The statute does not provide for the destruction or forfeiture of the place named, or of any other property, or for shutting it up or excluding any one from its possession; and it is useless to contend that any process issued under the statute could be used for any such purpose. The places named in the statute, and used for the purposes therein described, have for a long time been declared common nuisances by statute, still it has never been contended that they could be destroyed, or their physical condition changed, except as expressly provided by statute. As the former statutes prohibited such use as a crime, the only effect of the injunction which issued in this case, and perhaps the only one that could have issued, is to subject the respondents to process used to punish persons for violating injunctions, in addition to or substitution for criminal process. The injunction adds nothing to the prohibition of the statutes, the intent being to call into use the peculiar process employed in equity to punish persons guilty of willful violations of injunctions. The efficacy of such a statute depends wholly upon the proceedings that may be taken for punishing violations of injunctions, as there can be no decree for damages, or for a penalty, or affecting directly the title or condition of the property. It cannot be contended that it was the intent of the statute to secure respondent a jury trial for violation of an injunction; for equity always hears and determines such a charge without the aid of a jury. If, then, it was the intent to give the justice power to issue an interlocutory injunction, and to punish the offender, still equity would try an application for such an injunction without the aid of a jury. The principal reason the statute was passed, then, must have been to avoid a trial by jury; and unless the information is regarded as a criminal prosecution, it is difficult to see how the right of trial by jury can be obtained at any stage of the proceedings, unless the suit is considered as involving a controversy about property; and this cannot be, because no decree directly affecting property can be entered; and the fact that a jury trial may be granted upon the issue whether the building or place was used, at the time the information was

filed, for the illegal keeping or sale of intoxicating liquors does not remove the difficulty, as the decree which follows does not directly affect the person nor the condition of the property, such finding is preliminary to the issuance of a perpetual injunction, and punishment imposed when the injunction is violated. There can be no doubt that if proceedings under the statute in question are intended to prevent the repeated commission of a criminal act by the punishment, or threatened punishment, of persons charged with having committed it, the procedure provided by the statute is unconstitutional.

After a discussion of the cases involving an interpretation of the phrase "due process of law," the judge says that, so far as he has been able to ascertain, courts of equity have refused to entertain suits brought for the purpose of enjoining a person from keeping for sale or selling intoxicating liquors in violation of statutes. The purpose of the statute in dispute is, beyond doubt, to prevent the illegal sale of intoxicating liquors, by punishing by fine or imprisonment, or both, without limit, in the discretion of the court, an offender who undertakes to carry on such business after he has been enjoined. There would be no substantial difference between a statute which gives jurisdiction in equity to hear without a jury an information like this, and authorizes the court, if defendant is found guilty, to punish him, in its discretion, by fine or imprisonment, or both, without limit, and the statute under dispute. Still, such a statute would be clearly unconstitutional. A legislature cannot do indirectly what it cannot do directly. It cannot change the nature of things by giving them a new name. It cannot authorize a court, in a public prosecution, to restrain a party from illegally keeping or selling intoxicating liquors in any specified place in the state, nor can it authorize a court, at the suit of the state, to restrain any one from doing any illegal or criminal act anywhere within the state, and to try, without a jury, the party so enjoined, for violating the injunction, and if he is found guilty, fine or imprison him without limit. The legislature cannot deal with all crimes by way of injunction, nor can it so deal with those which have relation to some particular building, place, or tenement.

In conclusion, the judge remarks: "In the prosecution of crimes by way of injunction in equity, the existing statute of limitations would not be a defense, and the whole course of criminal procedure would be changed. It was not the intention of the constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except its own discretion. The safeguards of the common law were carefully secured by the declaration of rights, both in public prosecutions and in private suits, except in cases in which it has heretofore been otherways used and practiced. This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling or keeping for sale intoxicating liquors, from the earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in equity anywhere when the constitution was adopted. I think that the statute under which the present proceedings were brought is inconsistent with article 12 of the declaration of rights."

NUISANCES. — A statute authorizing any citizen of a county, where a place for the unlawful selling of liquor is kept, to abate the nuisance, is constitutional: *Littleton v. Fritz*, 65 Iowa, 488; 54 Am. Rep. 19; compare *Watertown v. Mayo*, 109 Mass. 315; 12 Am. Rep. 694; *State v. Common Pleas*, 36 N. J. L. 72; 13 Am. Rep. 422; but where a statute pronounces saloons, where liquors

are sold, to be nuisances, and provides that they may be abated, the keeping one open may not be perpetually enjoined by a court of equity: *State v. Crawford*, 28 Kan. 726; 42 Am. Rep. 182; though a court of equity may often enjoin the maintenance of a nuisance, notwithstanding an acquittal in a prior criminal prosecution therefor: *Minke v. Hofeman*, 87 Ill. 450; 29 Am. Rep. 63.

INJUNCTION. — Where the law affords an ample remedy, equity will not interfere by injunction or otherwise: *Chicago etc. R. R. Co. v. Maddox*, 92 Mo. 469; and by ample remedy is meant a complete remedy to which complainant may resort, and which he can control: *Wheeler v. Bedford*, 54 Conn. 244.

INJUNCTION — LIQUOR NUISANCES. — Injunctions against the sale of intoxicating liquors as a nuisance can be granted at the instance of a citizen of the county where the nuisance exists: *Judge v. Kahl*, 74 Iowa, 486; compare *Littleton v. Fritz*, 65 Id. 488; 54 Am. Rep. 19; and a Methodist minister who resides in a county merely for the purpose of preaching for one year, and subject to be removed to another county at any time by his bishop, is a citizen, within the provisions of the statute authorizing a "citizen of the county" to abate a liquor nuisance: *Fuller v. McDonnell*, 75 Iowa, 220; but where one citizen of a county brings an action to abate a liquor nuisance, another citizen of the same county cannot intervene and be made party plaintiff, under the Iowa Code: *Conley v. Zerber*, 74 Id. 699.

DISCRETION OF COURT IN MATTERS OF INJUNCTION. — The granting, continuing, or dissolving of a temporary injunction is discretionary with the court, and the court's action will not be reviewed with reference thereto, unless it clearly appears that error has been committed: *Strasser v. Moonelis*, 108 N. Y. 611; *Mead v. Anderson*, 40 Kan. 203. In equity the chancellor has the discretion of granting or refusing an injunction, and his discretion will not ordinarily be reviewed: *Mason v. Kirkpatrick*, 77 Ga. 492; and where the evidence controlling the issues involved in an application for an injunction is conflicting, the discretion of the chancellor will not be reviewed: *Lamar v. Lanier House Co.*, 76 Id. 640; but in an action to restrain a liquor nuisance, where the nuisance is established, the court must order its abatement: *McClure v. Braniff*, 75 Iowa, 38. Upon hearing an application for injunction, the court has the discretion of receiving or of rejecting secondary evidence, and he also has the discretion of requiring or not requiring all the means of discovering the primary evidence to be exhausted: *Davis v. Covington etc. R. R. Co.*, 77 Ga. 322.

NUISANCES, WHO MAY ABATE. — An information in equity in the name of the attorney-general at the relation of the parties interested is the usual mode of abating or removing public nuisances of a permanent character: *Attorney-General v. Tarr*, 148 Mass. 309; so where a railroad unlawfully obstructs the free passage or customary use of a public park, the nuisance may be abated by the people in a court of equity; but if it is not a nuisance, the remedy would be by the holder of the legal title of the land, not by the public: *People v. Park etc. R. R. Co.*, 76 Cal. 156.

GOULD v. STEIN.

[143 MASSACHUSETTS, 570.]

SALE BY SAMPLE — WARRANTY. — A sale of a specified number of "bales Ceara scrap-rubber, as per samples of second quality," imports warranty that the goods furnished will be similar to the samples, and that they will be of the quality promised, and there is a breach of warranty when the goods furnished are not of second quality, no matter whether they are equally as good as the samples or not.

SALE — DESCRIPTION — WARRANTY. — Where goods on a sale are described as of certain quality, well known in the market as indicating goods of a distinct though not absolutely uniform grade or standard, the description imports a warranty that the goods are of that grade or standard, and the descriptive words are not to be treated as merely words of general commendation, but as words having a specific commercial signification.

J. H. Dougherty and G. A. King, for the defendants.

J. B. Warner and H. E. Warner, for the plaintiffs.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that these notes were intended to express the terms of the sale. They were carefully prepared, and were read to the parties line by line as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances.

The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that if there was any warranty there was none which survived the acceptance of the goods by the plaintiffs; but the argument that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial, and there is no occasion to consider the further question, whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods.

The bought note which the plaintiffs put in evidence was of "143 bales Ceara scrap-rubber, as per samples, viz., 46 bales of first quality, marked A, . . . and 102 bales of second quality." The controversy relates only to the 102 bales. ~~It~~

appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market, as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the 102 bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples; and the court found damages for the plaintiffs solely on the ground that the defendants failed to deliver rubber of the second quality, ruling that the broker's note contained an absolute warranty of second-quality rubber. If this ruling was right, it disposes of the defendants' second and third requests for instructions.

The general rule is familiar, and admitted, that a sale of goods by a particular description imports a warranty that the goods are of that description: *Henshaw v. Robins*, 9 Met. 83; 43 Am. Dec. 367; *Harrington v. Smith*, 138 Mass. 92; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13; *Osgood v. Lewis*, 2 Har. & G. 495; *Randall v. Newson*, 2 Q. B. Div. 102; *Jones v. Just*, L. R. 3 Q. B. 197; *Josling v. Kingsford*, 13 Com. B., N. S., 447; *Bowes v. Shand*, 2 App. Cas. 455. And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct though not absolutely uniform grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus in *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420, the words in a sale note, "Sold Mr. E. T. Hastings two thousand gallons prime quality winter oil," were held to amount to a warranty that the article sold agreed with the description; and in *Henshaw v. Robins*, 9 Met. 83, 87, 43 Am. Dec. 369, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this commonwealth. So in *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203, it was held that where a manufacturer of flour marked it as of

a particular quality, viz., "Trafalgar Mills Extra Superfine," it amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 Id. 57, 60; *Forcheimer v. Stewart*, 65 Iowa, 593; 54 Am. Rep. 30; and *Mader v. Jones*, 1 Nova Scotia, 82. In *Gardner v. Lane*, 9 Allen, 492, 85 Am. Dec. 779, and 12 Allen, 39, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that, if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after being thus prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee, there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

Now, if the words "as per samples" had not been in the bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the insertion of those words raises the inquiry whether they limit the implied warranty of the vendor, so that, if the rubber sold was equal in quality to the sample, he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples," except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But if it is found that the bought note admits of a reasonable construction, by which a proper significance can be given both to the words "as per samples" and

the words "of second quality," there will be no occasion to disregard either.

Cases are to be found in the books where such a construction has been given to contracts of sale. Thus in *Whitney v. Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo-hides, with all faults, was held to mean with such faults or defects as the article sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd v. Kain*, 5 Barn. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken "with all faults, without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have; the court saying, by way of illustration: "Suppose a silver service sold 'with all faults,' and it turns out to be plated." So in *Nichol v. Godts*, 10 Ex. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not foreign refined rape oil, although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar: See *Wieler v. Schilizzi*, 17 Com. B. 619; *Josling v. Kingsford*, 13 Com. B., N. S., 447; *Mody v. Gregson*, L. R. 4 Ex. 49; *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, 2 Q. B. Div. 102.

In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rubber. Construed thus, the article sold was 102 bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was in fact Ceara rubber; there was no question that it was of the right kind. But it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well-known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and rubber of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second

quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a two-fold warranty, and this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should merely conform to that description: *Henshaw v. Robins*, 9 Met. 83; 43 Am. Dec. 369; *Jones v. Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense: *Drummond v. Van Ingen*, 12 App. Cas. 284; *Mody v. Gregson*, L. R. 4 Ex. 49; *Nichol v. Godts*, 10 Ex. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality, notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance.

For these reasons, in the opinion of a majority of the court, the entry must be, exceptions overruled.

SALES BY SAMPLE, as to the law respecting: Extended note to *Bradford v. Manly*, 7 Am. Dec. 126-132. As to the implied warranty when sales are made by sample: *Id.*; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321, and particularly note 328, 329. As to what warranties are implied in the sale of chattels generally: *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199, and cases cited in note 206, 207.

COLLAMORE v. GILLIS.

[149 MASSACHUSETTS, 572.]

FIXTURES. — A BAKER'S OVEN, BUILT BY THE TENANT upon the landlord's premises in such manner that it becomes a fixed and permanent structure, so united with the building that the two are inseparable without the destruction of the one and substantial injury to the other, and so built that, when taken down, it loses its character as an oven, and, with the exception of an iron lining and door, becomes mere brick and mortar, is not a removable fixture.

TORT for removal of an oven from a bakery belonging to plaintiff. The oven was built by plaintiff's tenant, and was constructed on the cellar-floor and against the cellar-wall of the leased building. It was composed of bricks and mortar, and an iron interior and door. The masonry of the oven was built into slots cut into the cellar-wall, and it was so "tied" to the wall; and in building the oven, a chimney was also cut off, and the former built up to it. During the term, defendant purchased and removed the oven, thus leaving the slots in the cellar-wall open, the chimney shorter than formerly, and the floor open at the bottom. It was shown that the oven could not have been removed intact, and that the masonry thereof was knocked down and the bricks taken away.

S. J. Elder and F. A. P. Fiske, for the plaintiff.

I. R. Clark and F. Ranney, for the defendant.

C. ALLEN, J. In determining whether an addition made by a tenant to a leased building is removable or not by him during his term, the chief element to be considered is the mode of its annexation, and whether it can be removed without substantial injury to the building or to itself. The intention with which it was put there, though often an element to be considered, is of secondary importance: *Wall v. Hinds*, 4 Gray, 256, 270; 64 Am. Dec. 64; *Whiting v. Brastow*, 4 Pick. 310; *Hanrahan v. O'Reilly*, 102 Mass. 201, 203; *Weston v. Weston*, 102 Id. 514, 519; Amos and Ferard on Fixtures, 3d ed., 7, 65. It is true that machines or structures which cannot be severed without taking them in pieces may, nevertheless, often be removed: *Antoni v. Belknap*, 102 Mass. 198. In *Penton v. Robart*, 2 East, 88, which is sometimes cited as supporting a broader doctrine, all that was removed by the tenant was a superstructure of wood, which had been brought from another place and put upon a brick foundation let into the ground. He pulled down the wooden superstructure and

carried away the materials, but did not undertake to remove the brick foundation, which, perhaps, was not placed there by him. The case of *Van Ness v. Pacard*, 2 Pet. 137, goes further; but the more recent case of *Kutter v. Smith*, 2 Wall. 491, 497, appears to recognize a narrower rule, though without any extended discussion of the question. *Hill v. Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209, follows *Van Ness v. Pacard*, *supra*; and *White's Appeal*, 10 Pa. St. 252, is similar. We are not inclined to extend the right of removal so far as to include a thing which cannot be severed from the realty without being destroyed, or reduced to a mere mass of crude materials.

In the case before us, the oven was not like a machine or a structure the parts of which are fitted to each other, and can be taken apart and put together again at pleasure in some other place. It had, so to speak, no removable identity, but when taken down, it necessarily lost its character as an oven, and, with the exception of the iron lining and door, became mere bricks and mortar. When built, it was in the nature of a fixed and permanent structure, which was so united with the building that the two became inseparable without the destruction of the one and a substantial injury to the other. Under such circumstances, we think the better reason is in favor of holding that the oven was not removable; and this view is more in accordance with the cases which have heretofore arisen in this commonwealth. This result is also strongly supported by the decision in *Whitehead v. Bennett*, 27 L. J. Ch. 474. The authority of this case, it is said in *Amos and Ferard on Fixtures*, 3d ed., 63, has never been impugned in England, and it was cited with approval and commendation by Lord Chancellor Selborne, in *Wake v. Hall*, L. R. 7 Q. B. D. 295, 301. See also *Sunderland v. Newton*, 3 Sim. 450; *Jenkins v. Gething*, 2 Johns. & H. 520; *Ombony v. Jones*, 19 N. Y. 234; *Ford v. Cobb*, 20 Id. 344.

The result, in the opinion of a majority of the court, is, that, according to the terms of the report, there must be judgment for the plaintiff for one hundred dollars.

Judgment for the plaintiff.

FIXTURES. — AS TO WHAT ARE FIXTURES GENERALLY: *Hunt v. Mullanphy*, 1 Mo. 508; 14 Am. Dec. 300, and particularly note 303, 304; *Gray v. Holdship*, 17 Serg. & R. 413; 17 Am. Dec. 680, and extended note 686-696; *Ingalls v. St. Paul etc. R'y Co.*, 39 Minn. 479; 12 Am. St. Rep. 676, and note. Portable furnaces are fixtures: Note to *Hubbell v. East Cambridge etc. Bank*,

42 Am. Rep. 447-449. As to when and under what circumstances a tenant may remove fixtures: *Holmes v. Tremper*, 20 Johns. 29; 11 Am. Dec. 238, and extended note 241-244.

FIXTURES. — What would otherwise be considered as a fixture may, by agreement between the parties, be considered merely as personalty: *Booth v. Oliver*, 67 Mich. 664.

FIXTURES. — To give to personalty the character of a fixture, there must be an actual or constructive annexation to the freehold, as well as an adaptation to the use of the part of the freehold to which it is annexed: *Danz v. Burke*, 62 N. H. 627; so that machinery in a factory which furnishes the motive power, as distinguished from such machinery as is operated by it, when permanently annexed to the freehold, is ordinarily a fixture: *Cass Mfg. Co. v. Garson*, 45 Ohio St. 289.

EVERETT v. EDWARDS.

[149 MASSACHUSETTS, 588.]

PLEADING AND PRACTICE — PARTIES. — **MORTGAGERS** are properly made parties defendant to a suit in equity the result of which may be to impair their security.

PARTY-WALLS. — Where the owner of two adjoining city lots built a house upon each lot, each separated from the other by a brick wall, one half of which was on each lot, and afterwards conveyed the houses to different grantees by separate deeds, and in each deed described the boundary as "a line running longitudinally through the center of the partition wall between the houses," the wall thus referred to is thereby made a party-wall.

PARTY-WALLS. — Each owner of a party-wall may build it higher and use it as the lateral wall of such house as he may desire to erect, so long as he does not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall, the owners have an equal right to it, and the value of the wall to either cannot be thereby impaired, and neither can so use the wall as to weaken or injure it.

PARTY-WALLS. — In an action by one owner of a party-wall against the other to recover damages for building the wall to a greater height, plaintiff cannot maintain his suit merely on the ground that the wall was erected contrary to a statute or an ordinance. He must at least show some damage or detriment to himself in consequence.

R. M. Morse, Jr., and C. S. Hamlin, for the plaintiff.

E. W. Hutchins and J. H. Young, for the mortgagees.

W. ALLEN, J. In the year 1826 the owner of two adjoining city lots built a house upon each lot, each separated from the other by a brick wall, one half of which was on each lot. The next year he conveyed one of the lots to the plaintiff's grantor, and in 1828 he conveyed the other house to another grantee, under whom the defendants claim. In each deed the boundary line between the houses is described as "a line running

longitudinally through the center of the partition wall between the houses," and the same description is contained in the deeds to the plaintiff and to the defendants, which deeds were dated May 11, 1886, and June 1, 1883, respectively. The wall remained without change until July or August, 1885. In June, 1885, the defendant Edwards borrowed of the defendants Ropes and Dexter twenty thousand dollars on a mortgage of his estate, for the purpose of building an addition to his house, and soon after built up the wall so that it was five feet higher than the peak of the wall as it had been, and eighteen feet above the eaves, putting on a flat roof, and completing the work on September 1, 1885. On November 3, 1886, the plaintiff brought this bill against Edwards alone, to have him compelled to remove so much of the addition to the wall as is on the plaintiff's side of the division line, and for damages. After a hearing upon the merits, a decree was entered ordering the removal of the wall, from which the defendant Edwards appealed. Subsequently, and after the entry had been made on the docket that Edwards withdrew his appeal, the mortgagees, Ropes and Dexter, presented a petition, praying that the decree might be vacated, and that they might be allowed to become parties defendant, and to defend the suit on the merits. At the same time, one Chipman, who held a second mortgage of five thousand dollars on the estate, given by Edwards in September, 1885, filed a similar petition. The petitions were allowed, and the petitioners were admitted as defendants, and filed answers. The plaintiff appealed. The case was heard upon the merits, and reported to the full court.

The mortgagees are directly interested in the subject-matter of the suit. It seeks to diminish the value of their security, and is brought to establish the right of the plaintiff to do so. If the plaintiff removed the wall without right, he would be liable therefor to the mortgagees: *James v. Worcester*, 141 Mass. 361, and cases cited. The bill is brought to establish and exercise for him his right to remove it. It is no answer to say that if the security is impaired it will be in consequence of the wrongful act of the mortgagor with the permission of the mortgagees. The question whether the act was wrongful is a question upon which the mortgagees have a right to be heard. They are immediately interested in resisting the plaintiff's claim, and are necessary parties to the suit, and their petitions that the decree should be vacated and that they be admitted as defendants were properly allowed.

The wall, as it stood before it was built upon by Edwards, was a party-wall. It was built and conveyed by the owner of both estates as the partition wall between the houses, and has been used as a party-wall by the several owners of the houses for fifty years. No express grant or agreement or statute defines or limits the rights of the parties, and they are such as the law implies to have been the intention of the parties from the grant, expressed or implied from user of the wall as a party-wall, and it is immaterial whether the grant is by the single owner of both estates, or is the mutual grant of several owners: See *Webster v. Stevens*, 5 Duer, 553; *Richards v. Rose*, 9 Ex. 218. The wall must be taken to have been built as a single structure, and granted by the owner or owners of two estates to constitute the wall of the house upon each estate. It was not the dividing line between the houses, because it was a part of each house, and each owner had an equal right in the whole wall with the other owner. The estate which the owners have in it is an estate in a party-wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party-wall, rather than by classifying it with other estates and deducing its qualities from the name given to it. The English courts, when, looking at the common interest and right of the parties, they call it a tenancy in common, do not mean that either party can have partition; and the courts of New York, when, considering the rights of one owner in the part of the wall on the land of the other owner, they say that each owns one half in severalty, with an easement in the other half, are not prevented from deciding in the same case that each can take down and rebuild the half of the other (*Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632), nor from deciding that the easement is not an encumbrance upon either estate, but a benefit to each: *Hendricks v. Stark*, 37 N. Y. 106; 98 Am. Dec. 549. See also *Bertram v. Curtis*, 31 Iowa, 46.

We are not considering the frequent cases where the rights of the parties are defined by special terms or agreements, but the simple grant, express or implied, of a party-wall; and this is a grant by the owner of both estates, or the mutual grant of the separate owners, of rights in a wall situated on both estates. What these rights are depends upon the presumed intention of the parties. The question involved in this case is, whether such a grant is limited as to the height of the wall to a particular wall, or to the wall which shall first be built

under it, or whether it gives to either party a right to build higher an established wall for the purpose of putting an addition upon his house. It is assumed that this will be done without impairing the integrity or stability of the existing wall.

The purpose of each of the adjoining owners in providing for a party-wall is the same. It is intended to form part of a building on his land. A party-wall is as beneficial to him as a several wall, and it is no detriment to him; for the use which one owner makes of it as a wall of his building cannot impair the use of the other. In effect, each owner acquires the right to build one half of his wall upon his neighbor's land, and each, contributing his portion of the expense, has a right to an equal benefit in a wall so built. The wall is a substitute to each for a separate wall, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor. With this limitation, it will be presumed that each intended it for all uses and purposes to which the wall of his building would ordinarily and properly be put. That presumption is for the advantage of both, and to the detriment of neither. If the party-wall cannot be built up, neither house can be raised without building a new wall; for if one owner could lawfully build a several wall upon the part of the wall over his own land, it would not be a right of practical value; he could not build on it a sufficient wall. It is not reasonable to suppose that each party intended that he should never use the wall for a building higher than the one that should be first erected, and a provision to that effect, detrimental to both parties and beneficial to neither, cannot be presumed. If it is said that one owner may not wish to use the wall as built up, and may prefer not to have the adjoining building higher than his own, the answer is, that that is a particular and exceptional circumstance which cannot be presumed. It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption, unless it is controlled by their terms. Not only would a provision implied in a grant of a party-wall that it should not be carried higher than as originally constructed be contrary to the interests and the apparent intention of the parties, but it would not be in accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings,

and the law will not be swift to construe the acts of parties so as to produce that effect.

We have been referred to very few authorities upon the subject, and the question of the right of one owner of a party-wall to build it up seems to have been very seldom raised. *Phillips v. Bordman*, 4 Allen, 147, discusses the right in a party-wall as an easement, and there is certainly nothing in the case unfavorable to the right to build upon the wall. *Sanborn v. Rice*, 129 Mass. 387, was tort for breaking and entering the plaintiff's close by building up the partition wall between the houses of the plaintiff and the defendant, and the action was sustained; but the only question considered in the opinion was whether there was any evidence that the plaintiff owned to the middle of the wall. It is said of that case in *Quinn v. Morse*, 130 Mass. 317, at page 322, that "so much of the wall as was carried up by the defendant on the plaintiff's land was not as wide as the original wall, nor was its face, toward the plaintiff's land, parallel with the center line of that wall; and the defendant did not rely on any right to carry up a party-wall upon the plaintiff's land, but on the plaintiff's want of title in the land itself." *Quinn v. Morse, supra*, was a bill in equity to restrain the defendant from building up a partition wall between him and the plaintiff. The plaintiff had conveyed the estate to the defendant, bounding on the middle of the partition wall. This sale was in pursuance of an agreement by which the defendant agreed to pay to the plaintiff, for half of the wall, what it was worth to the defendant for building a store on the land. The court say that the intention of the plaintiff that the wall should be a party-wall, which the defendant would have a right to carry up in building his store, was manifested by the agreement. The agreement was only to sell one half of the wall for what it should be worth in building a store. The right to carry up the wall seems to have been inferred from the intention in the agreement that it should be a party-wall.

In *McLaughlin v. Cecconi*, 141 Mass. 252, the whole wall was on the plaintiff's land, and belonged to him, and no question in regard to party-walls arose. *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, is directly in point, and decides that one owner of a party-wall has a right to build it up. In *Partridge v. Gilbert, supra*, in which it was decided that one owner had a right to take down and rebuild a ruinous party-wall, the wall was rebuilt higher than before. The party rebuilding

was held not liable. It seems well settled that one owner of a party-wall has a right to take down and rebuild it when ruinous. In *Campell v. Mesier*, 4 Johns. Ch. 334, 8 Am. Dec. 570, Chancellor Kent decided that one owner of a party-wall who had rebuilt it could recover contribution from the other owner. In *Standard Bank v. Stokes*, L. R. 9 Ch. Div. 68, it was said that one owner of a party-wall, where the metropolitan building act did not apply, had a right to lower the foundation so as to give him a sub-basement. In *Field v. Leiter*, 117 Ill. 341, the wall was built by the plaintiff, one half on adjoining land. The defendant bought the adjoining land, and an agreement was made between the parties by which the defendant might use the wall as a party-wall for his store, ten stories high, with the right to add to the height of it, the defendant agreeing to strengthen the wall and foundation by necessary additions thereto on his own side. It was held that the defendant had a right to make necessary additions to the foundation on the plaintiff's side. *Eno v. Del Vecchio*, 4 Duer, 53, decided that one owner might underpin and deepen the foundation, and raise the wall higher on his own land. *Matts v. Hawkins*, 5 Taunt. 20, has been cited as deciding that one owner of a party-wall can lawfully take down an addition built upon it by the other owner. But this is expressly decided under the building act, 14 George III., chapter 78, which regulated the rights of the owners.

We have seen nothing in the English cases, such as *Cubitt v. Porter*, 8 Barn. & C. 257, *Wiltshire v. Sidford*, 1 Man. & R. 404, *Stedman v. Smith*, 8 El. & B. 1, and *Watson v. Gray*, L. R. 14 Ch. Div. 192, in which owners of a party-wall are called tenants in common, and which decide that tenancy in a party-wall has some of the qualities of tenancy in common, which suggests that one owner of a party-wall for the lateral support of buildings can have partition of the wall, or cannot carry it up higher than it may originally be built for the purpose of using it as the wall of his building.

The limitation upon the right of each owner to use the wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall, and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired; but neither owner has a right so to use the wall as to weaken or injure it: *Phillips v. Bordman*, 4 Allen, 147.

judge who heard this case found that the wall was not insecure, and did not render the plaintiff's house insecure, and it does not appear that in any particular the new erection impairs the value of the old wall to the plaintiff.

The plaintiff contends that he can take advantage in this suit of the violation by the defendant Edwards of the Statutes of 1885, chapter 374, and of the ordinances of the city of Boston, by building up the wall without a permit from the inspector of buildings, and by making the wall of less thickness than required by that statute and the ordinances. But these were not intended, as was the English statute before referred to, to regulate the rights of the parties between themselves, but for the public protection and security. The statute prescribes penalties for its violation, and provides for its enforcement by proceedings in equity by the inspectors of buildings. We do not think that the plaintiff can maintain any suit against the defendants merely on the ground that the wall was erected contrary to the provisions of the statute or of the ordinance. He must at least show some damage or detriment to himself in consequence. None is shown. The old wall cannot be affected by the statute. The fact that the new erection is a party-wall does not expose the plaintiff to the animadversion of the law, or to any detriment in respect of the wall. The worst that could happen to him would be that it should be taken down.

We think that, as between the owners, Edwards had a right to carry up the wall, leaving the old part of the wall intact and secure. If the manner in which he did this was in violation of the statute, that fact does not give to the plaintiff the right to have the wall taken down.

Bill dismissed.

PARTY-WALL — RIGHT TO BUILD UPON AND CARRY TO A GREATER HEIGHT.
— In the case of *Matthews v. Dixey*, 149 Mass. 595, the owner of adjoining city lots conveyed them to different grantees, and in the deed to each provided that "the center of the easterly and westerly partition walls of the houses first erected on the said land shall be placed on the division lines between the granted premises and the adjoining lots," and the party first building such partition wall shall receive from the party using it one half its actual cost. The owner of one of the lots built a house thereon with a partition wall on the division line as far as the house extended, and then built a fence on the rest of the line. Afterwards, the owner of the adjoining lot, desiring to build a higher and deeper house on his land, proceeded to build upon and carry to a greater height the partition wall, and displaced the wooden fence in the rear of the other house, and the court held that he could

so build upon and extend the partition wall, so long as no injury was thereby done to it, and that equity would not enjoin him from so doing.

PARTY-WALLS. — The law relating to party-walls generally is treated of in an extended note to *Bloch v. Isham*, 92 Am. Dec. 289-306, wherein the right of building upon and adding to party-walls is discussed, as well as the ownership of such walls and the easements incident thereto.

PARTY-WALLS. — Where a party-wall is built equally upon the adjacent lots of two adjoining owners by one of such owners, and the other owner subsequently uses the party-wall for a building erected by him, without paying for half of such wall, and afterwards conveys the lot and building to a third person, who has full knowledge of all the facts, such purchaser must pay the builder of the wall or his grantee one half of the cost thereof: *Pew v. Buchanan*, 72 Iowa, 637. Each of the adjacent owners owns the half of a party-wall which is upon his land, but has no right to finish the face of the other half in any particular manner, unless by special agreement with the other owner: *McCarthy v. Mutual R. Ass'n*, 81 Cal. 584.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

DIBBLE v. NORTHERN ASSURANCE COMPANY.

[70 MICHIGAN, L.]

FIRE INSURANCE — CANCELLATION OF ONE POLICY AND DELIVERY OF ANOTHER. — Where an insurance agent with general authority from the owner to keep his property insured cancels one policy on order of the company issuing it, and immediately reinsures in another company, paying the premium, notifying the assured by mail of the transaction, and depositing the policy in his safe for the assured, this is a sufficient cancellation of the first and delivery of the second policy to bind the latter company in case of loss.

JURY AND JURORS. — **CREDIBILITY OF TESTIMONY SUBSTANTIALLY UNCONTRADICTED** is for the jury, and it is not within the province of the court to discredit such testimony in its instructions.

Norris and Norris, for the appellant.

Pope and Hart, for the plaintiff.

SHERWOOD, C. J. The defendant is a corporation organized under the laws of England, doing business in this state, in the county of Allegan, at which place Hollister F. Marsh, Jr., was, in December, 1885 and 1886, its local agent. He was also such agent for the Sun Fire Insurance Company.

The plaintiff lived at Salem, in Allegan County, where he owned a store-building, in which was a stock of goods, both of which were insured in the defendant company. He also owned the two dwelling-houses described in the policy in this suit.

The agent, Mr. Marsh, lived at Allegan village, some fourteen miles distant from the plaintiff and his property, and was assisted in his insurance business by his son, Arthur Marsh.

The plaintiff had for several years previous to the time of issuing the policy in this suit placed his insurance with Marsh, and had given Marsh, the agent, authority to keep his property insured in such companies as Marsh might select, and to renew his policies whenever necessary for that purpose.

On December 19, 1885, Arthur Marsh was at Salem; saw Dibble, who applied to him specifically for the insurance on the dwelling-houses described in the policy in this suit. The application was verbal, and the selection of the company in which to place the insurance was left to the agent, Mr. Marsh. On the return of Arthur to Allegan, he reported the application to the agent, who, on December 21st, in pursuance of such application, placed the insurance in the Sun company, entered the same on his books of that company, and sent the policy to the plaintiff. He also reported the policy to the company, and advanced the premium given him by plaintiff. This policy contained the following clause: "The insurance may also be terminated at any time, at the option of the society, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

January 1, 1886, the Sun company notified Marsh, the agent, to cancel the policy, which he did in the usual way, and notified the plaintiff of the fact the same day by letter, which reached Salem the next day, which was Saturday; and in the same letter Marsh notified the plaintiff he (Marsh) had put the plaintiff's insurance in another company. At that time the plaintiff was absent from his home. His clerk, however, received the letter, and opened and read it. The agent, as soon as he canceled the Sun policy, placed the risks in the defendant company, issued the policy in suit, and placed it in his safe for the plaintiff; entered the policy on his daily register of the company's business, reported it to the defendant company, accompanied by the premium, which was three dollars, using the returned premium from the Sun company, advanced the balance, and charged the same to the plaintiff, who, as soon as he learned the facts, approved and ratified all Marsh had done for him in the premises.

The fire occurred, which did the damage to the buildings insured, on the Sunday evening after the policy was issued. It is for this injury the plaintiff brings this suit against the defendant under its policy.

The defendant, disavowing its liability upon the policy, on March 13, 1886, returned the premium it had received thereon

to its agent, Marsh, who, under the direction of the company, tendered it back to the plaintiff, and he refused to accept the same.

If the plaintiff is entitled to recover, the amount is not disputed, nor is any question made upon the proofs of loss. The facts are substantially undisputed. The plaintiff was allowed to recover in the circuit, where a trial was had before Judge Arnold and a jury. The defendant brings error.

An inspection of the record under the exceptions taken in receiving the testimony discloses no error. The defendant's position in regard to the policy in question is stated by its counsel as follows:—

“1. The policy was never delivered.

“2. The policy in suit was intended to take the place of the Sun fire-office policy, which was supposed to be canceled. The Sun fire-office policy was never canceled; *ergo*, defendant's policy never took effect.

“3. Defendant's policy was issued by Marsh acting as defendant's agent, and was accepted by him acting as plaintiff's agent, if it was ever accepted, as it is uncontradicted and undisputed,—*a.* That plaintiff did not know of this policy until after the fire; *b.* That he never ordered it to be issued. And we claim that a policy of insurance made by one person acting at the same time as agent for both parties thereto is void at the election of either party, unless they have full knowledge of how the same was made.”

We have no doubt but that the facts shown upon the trial were sufficient to establish the delivery claimed of the policy in question to the plaintiff. The cancellation of the Sun policy was sufficiently proved, if the jury believed the testimony in the case, and their verdict is against the defendant. Under the arrangement with the agent, as stated by himself, the consent of the plaintiff to a cancellation of the policy was not necessary. The selection of the companies in which plaintiff was to have his property kept insured was placed at the discretion of the agent. The plaintiff's knowledge, or want of knowledge, upon that subject could not affect the issue in this case under the contract the plaintiff claims to have had with the agent.

While Marsh could not act for both parties in making the contract of insurance, or upon any other matters relating to the business requiring the concurrence of both parties, he could act as the custodian of the policy which was issued for

the plaintiff until he should call for it. This was a matter in which the company had no interest, and over which it had no control whatever, and when the agent received it for the plaintiff for that purpose, it was clearly a delivery by the company. From the day the agent received the order for the insurance until the property burned, he had the direction of the plaintiff to issue the policy, and after it was issued and delivered neither party could modify or cancel the contract without some special authority so to do from the other.

Counsel for defendant at the close of the trial requested the court to give to the jury, in its charge, four written propositions, each of which closed with a clause asking the court to direct the verdict for the defendant. This the court correctly refused to do.

Three of the requests asked the court to pass upon the facts. While they were, as we have said, based upon testimony substantially uncontradicted, still its credibility was for the jury, and which, to reach the conclusion assumed in the requests, the court would have to discredit. The court is never permitted to do this.

We find nothing in the exceptions to the charge as given needing consideration.

The judgment must be affirmed.

INSURANCE. — Notice by an insurance company for the purpose of canceling a policy must be given to the insured himself, not merely to the broker through whom the policy was obtained: *Mutual Assur. Soc. v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note; *London etc. Ins. Co. v. Turnbull*, 86 Ky. 230.

INSURANCE AGENT. — An agent cannot issue a policy that will be valid and binding, where either the insurer or the insured has no knowledge of the transaction; for the consent and knowledge of both the insured and the insurer is absolutely necessary to effectuate a valid contract in insurance: *London etc. Ins. Co. v. Turnbull*, 86 Ky. 230. Where an insurance agent is authorized to issue policies and consummate the entire contract of insurance, he binds the insurer by any act, agreement, waiver, or representation within the scope of ordinary insurance business, when such acts, etc., are not known by the insured to be outside of such agent's authority: *National etc. F. Ins. Co. v. Barnes*, 41 Kan. 161; but to authorize an insurance agent to effect insurance in other companies in the interest of his principal he must have special authority from the principal so to do: *London etc. Ins. Co. v. Turnbull*, 86 Ky. 230.

JURY AND JURORS — CREDIBILITY OF WITNESSES. — The competency of witnesses is for the court, but their credibility is always for the jury: Extended note to *Dunn v. People*, 86 Am. Dec. 328-331; *State v. Hossie*, 15 R. I. 1; 2 Am. St. Rep. 838, and note; *Shekey v. Eldredge*, 71 Wis. 538; *People v. Ching Hing Chang*, 74 Cal. 389; and when all of the witnesses are entitled to equal credit, in the absence of controlling circumstances the greater number must control: *Kattenbach v. Holt*, 43 N. J. Eq. 536.

HITCHCOCK v. MOORE.

[70 MICHIGAN, 112.]

SLANDER — EVIDENCE OF CHARACTER. — Plaintiff in action for slander cannot show his general good character and reputation as part of his main case, even though he is asked upon cross-examination in relation to specific acts, which, if true, might tend to discredit his character and reputation.

SLANDER — EVIDENCE OF CHARACTER. — In slander, plaintiff's character is presumed to be of the best, and until it is assailed he cannot introduce evidence to add to or increase its virtue.

SLANDER — EVIDENCE — ANIMUS OF WITNESS. — Where plaintiff in action for slander has testified to defendant's bitter feeling toward him because of certain divorce proceedings, he may be cross-examined fully as to such proceedings, in order to show his animus, motive, and bias.

SLANDER — PRIVILEGED COMMUNICATIONS. — Plaintiff in action for slander cannot be compelled on cross-examination to divulge communications made by him to his divorced wife during marriage, nor can she testify thereto.

PLEADING AND PRACTICE — CONVERSATION NOT SHOWN TO BE CONNECTED WITH THE SUIT is inadmissible, and it is error to admit it, and after it is stricken out to allow counsel to comment upon it to the jury.

SLANDER — EVIDENCE IN MITIGATION OF DAMAGES. — Defendant in slander cannot, in mitigation of damages, prove threats uttered by plaintiff against him, unless he can show that such threats were communicated to him before the time when he is alleged to have spoken the slanderous words.

Cass E. Herrington and Theodore Hollister, for the appellant.

Taft and Smith, for the defendant.

MORSE, J. This is an action for slander, arising in White Lake, Oakland County, and tried in the circuit court for that county. Verdict and judgment went for the defendant.

It was charged in the declaration that the defendant had wrongfully accused, in various words and ways, the plaintiff of burning defendant's barn in August, 1886. The plea was the general issue.

We shall consider the errors assigned in the order in which they were argued before us.

1. Upon the cross-examination of the plaintiff he was asked questions concerning his treatment of his wife, who was a daughter of the defendant, and if he did not at one time, while they were living together, take her down and put his foot upon her, and otherwise use her cruelly.

The plaintiff called as his next witness one Jackson Voorheis, and his counsel proposed to show by such witness what

the general reputation of the plaintiff was, where he resided, as to being an upright, law-abiding citizen. This was excluded.

It is contended that the plaintiff has a right in this action to show his general good character and reputation as a part of his main case, as such character and reputation are necessarily involved in the issue, independently of the fact whether such character is attacked by defendant or not, and especially in this case, where, upon the cross-examination, the character of the plaintiff had been indirectly, if not directly, questioned. The following authorities are cited to sustain this contention: *Williams v. Haig*, 3 Rich. 362; 45 Am. Dec. 774; *Bennett v. Hyde*, 6 Conn. 24; *Adams v. Lawson*, 17 Gratt. 258; 94 Am. Dec. 455; *Shroyer v. Miller*, 3 W. Va. 158; *Sample v. Wynn*, Busb. 319; *Romayne v. Duane*, 3 Wash. C. C. 246; *Williams v. Greenwade*, 3 Dana, 432; *King v. Waring*, 5 Esp. 13; *Rogers v. Clifton*, 3 Bos. & P. 583; *Burton v. March*, 6 Jones, 409; Wood's Starkie on Slander and Libel, 717.

We think the better doctrine and the weight of authority support the ruling made by the court below. The law presumes the character of the plaintiff to be good until it is attacked, and he can safely rest upon that presumption. As long as it is not assailed, there is no comparative degree of good, better, best, in his character. It stands as the best. If he himself open the inquiry, then the comparison legitimately commences; and upon his own showing, and without any attack by the defendant, his character may be qualified and reduced below the standard of the presumption, upon which he may confidently rely until it is questioned by the opposite party. Without introducing any evidence, his reputation and character stand without qualification or defect, and no evidence that he may offer can add to or increase its force and virtue. The almost universal rule has been as held by the circuit judge. See the following authorities: *Cornwall v. Richardson*, Ryan & M. 305; *Matthews v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189; *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Id. 519; *Houghtaling v. Kelderhouse*, 2 Barb. 149; 1 N. Y. 530; *Gough v. St. John*, 16 Wend. 646; *Anderson v. Long*, 10 Serg. & R. 55; 1 Wharton on Evidence, 2d ed., secs. 47, 50; *Miles v. Vanhorn*, 17 Ind. 245; 79 Am. Dec. 477; *McCabe v. Platter*, 6 Blackf. 405; *Howard v. Patrick*, 43 Mich. 121. See also *Fahey v. Crotty*, 63 Id. 383; 6 Am. St. Rep. 305, and cases there cited.

Nor can the fact that inquiries are made, upon cross-examination, in relation to specific facts that may tend to weaken his good character and lessen his good reputation, change this rule. Such specific facts cannot be met, either as a part of the main case, or upon rebuttal, with evidence of general reputation in the community where he lives. If, upon such cross-examination, he admits the existence of such specific facts, they must stand against him for what they are worth, except as they may be explained and qualified by evidence or explanation in his behalf. If they are denied by him, and the defendant introduces testimony tending to establish them, he has the right, in rebuttal, to deny them, and establish their falsity or non-existence.

2. The cross-examination of the plaintiff with the view of showing that there had been divorce proceedings between the plaintiff and his wife; that under the decree in the case he had been compelled to pay five hundred dollars for the support of his child; and that he had made threats that he was going to get a portion of the money back,—was coupled with a remark by defendant's counsel, "and, in my judgment, that is all this suit is for, so far as that is concerned," and the further statement, "that is our theory of the case, may it please the court."

This testimony was competent to show the *animus*, motive, and bias of the witness. He had also testified, on his direct examination, in regard to the divorce proceedings, and that on account of the differences between himself and his wife, the feeling of the defendant was very bitter towards him. It was therefore proper to cross-examine him on this subject.

3. The plaintiff, upon cross-examination, was interrogated in relation to communications claimed to have been made by him to his wife before the severance of the marital relation, and Adelaide V. Hitchcock, his divorced wife, was permitted, against objection, to testify as to what the plaintiff said to her while he was her husband.

This was plainly error, and against the express prohibition of the statute: Laws of 1855, p. 288; *Maynard v. Vinton*, 59 Mich. 151, 152; 60 Am. Rep. 276. Death does not release the seal of secrecy enjoined by the statute, and if death cannot remove the disability, a divorce will not do so.

4. One William Wickens, a witness for defendant, was questioned in regard to a conversation with plaintiff, in which the plaintiff requested Wickens to get the defendant drunk, at

plaintiff's expense. The questions were asked with the evident intent of proving that the time of getting him drunk related to the trial of the case under consideration.

The counsel for the plaintiff, before the witness had stated the time of the conversation, or what it was, requested the court to permit him to ask the witness if the conversation pertained to the suit then on trial. This request the court refused. The witness then stated, under objection from plaintiff's counsel, that plaintiff said to him that he wished to recover possession of his child; and also said: "'You see Mr. Moore up here occasionally, do you not?' I said I did. He wanted to know if I would not get Mr. Moore drunk, and he would stand the expense."

After an ineffectual attempt to connect this testimony with the suit at bar, the attorneys for defendant consented that the testimony of the witness might be stricken out of the case, and it was struck out.

If plaintiff's counsel had been permitted to ask the question desired by him, the testimony of the witness would not have gone before the jury to the prejudice of the plaintiff.

But the error did not stop here. When the counsel for the defendant were presenting the case to the jury, after the evidence was all submitted, Mr. Smith, in his argument, said: "To go and get the old man drunk, in this case, because he occasionally takes a glass of beer; to get him under the influence of liquor; and when he was under that influence,—oh, the double-damned damnation of the man, when he wouldn't take him at his best; wouldn't rely upon his age; but he must make him intoxicated before he dare get statements."

Mr. Herrington, of counsel for plaintiff, interrupting: "I except to these remarks, because there is no evidence that the plaintiff expected to get the defendant intoxicated."

Mr. Smith, proceeding: "What does he do? He says, 'Get him drunk. Take advantage of him.' That is the man that comes in here and asks for damages at your hands."

Mr. Herrington: "I except to the remark that he said, 'Get him drunk.'"

Mr. Smith: "Is he entitled to the slightest consideration at your hands? Not any. It does not stop there. There are other things in the case which bear upon his character; and what is it? In the month of June, 1886, at a time when they were getting in hay, what occurred then that shows that that man has got no character or no standing? What did he do?"

Riding by in a buggy, after meeting the old man upon the road, and seeing John Gulick, his hired man, down in the field getting up the hay, he says: 'See the sons of bitches toiling, getting in their hay. It will do them no good. They will never feed it out.' Oh, what does that mean? It means that which was consummated in less than sixty days; that it did go up in the smoke and the flame, together with that barn that went up on the evening in August."

Mr. Herrington: "I except to that as incompetent, because they cannot prove that he set the barn on fire."

Mr. Smith: "If he was treated justly to-day he would be arrested for suborning witnesses, which is a state-prison offense."

Mr. Herrington: "I except to those remarks."

It does not appear from the record that the court had anything to say while these proceedings were going on. There was no evidence in the case to warrant the language of Mr. Smith in relation to the attempt of the plaintiff to get defendant drunk, and he should have been promptly stopped when the attention of the court was called to it by the exception of plaintiff's counsel.

Neither was it proper for Mr. Smith to charge, as he did, that plaintiff burned the barn. There was nothing in the pleadings that justified the raising of any such issue. It was competent to show that the plaintiff had threatened to burn the barn, if such threats were made known to the defendant before the speaking of the alleged slanderous words, in mitigation of damages, as tending to show that defendant had good reason to believe that he was speaking the truth. Such threats were admissible for no other purpose, save to show bias of plaintiff, under the pleadings.

Besides, it was shown by the witness Mr. Hyde, who testified to these remarks of plaintiff about the hay, that the conversation had never been communicated to the defendant. The testimony was introduced ostensibly to show malice upon the part of plaintiff toward defendant. The evidence of the witness Hutchins was confined to remarks made by the plaintiff about the divorce suit, and that he said Mr. Moore and his family were trying to ruin him, and if he ever got a chance, — "got a clew to make him pay back the money, — he would try his turns. He said if he ever got the chance he should like to see Moore in Jackson, because he thought he had misused him altogether."

This talk was not communicated to defendant before the alleged utterance of the slanderous words.

5. A motion was made to strike out the evidence of both the witnesses, Hyde and Hutchins, as incompetent and immaterial. The motion was denied. The testimony of the witnesses was properly retained, as bearing upon the motive and bias of the plaintiff, and thereby affecting his credibility as a witness. But it should not have been used for any other purpose, and the jury should have been so instructed; but they were not. Nor should counsel have been permitted to use this evidence to establish a burning of the barn by the plaintiff, or in mitigation of damages. There was no evidence that defendant knew anything of these threats at the time he was charged with speaking the slanderous words.

Adelaide V. Hitchcock could not legally testify that she told her father what her husband said to her while she was his wife, and state what she told her father, as that would be a violation of the statute. It would permit her indirectly to do what the statute forbids her to do directly, as she would thus place before the jury the statements of her husband to her. It may be that the defendant might state, in his own defense, in mitigation of damages, what his daughter stated to him, if the statement was made before the alleged slander; but he testified to nothing of the kind on the trial.

There was no proof in the case, according to the record, which purports to set out substantially all the testimony in the case, that any threat of the plaintiff against the defendant was communicated to him before the alleged slander, excepting the statement made in his presence to her mother by Adelaide V. Hitchcock, which was not admissible, and which it is not certain, from her testimony, that he heard. Therefore the court should have given the following instruction asked by the plaintiff's counsel: "There is no evidence in this case which can be received in mitigation of damages."

6. We do not think the court erred in his instruction to the jury in relation to the receipt. That was a question for the jury to determine; and the court very properly said that they must find how far the plaintiff was connected with it, and how far that connection, if he was connected at all, affected his credit as a witness.

For the errors herein noted, the judgment below is reversed, and the plaintiff granted a new trial, with costs of this court.

SLANDER — EVIDENCE OF CHARACTER IN ACTIONS FOR. — Evidence of a party's good character is inadmissible in civil actions, where such character is not directly in issue: *Fahey v. Crotty*, 63 Mich. 383; 6 Am. St. Rep. 305, and note; compare *Anthony v. Stephens*, 1 Mo. 254; 13 Am. Dec. 497, and particularly note 499, 500. Evidence in a slander case of plaintiff's good character is inadmissible, as a general rule, until there has been an attempt by evidence to impeach it: *Miles v. Vanhorn*, 17 Ind. 245; 79 Am. Dec. 477; *Rhodes v. James*, 7 Ala. 574; 42 Am. Dec. 604; but the defendant may show that the plaintiff's reputation, in regard to the particular crime charged in the slander, prior to the utterance of the alleged slanderous words, was bad: *B—— v. J——*, 22 Wis. 372; 94 Am. Dec. 604; and it has been held in a South Carolina case that the general good character of the plaintiff, in an action for slander, could be admitted in evidence, even though not called in question by the defendant: *Williams v. Haig*, 3 Rich. 362; 45 Am. Dec. 774; compare note to *O'Bryan v. O'Bryan*, 53 Id. 133, 134, as to the admissibility of evidence of character generally. It is not competent to inquire upon cross-examination into rumors affecting a plaintiff's character, where in an action for slander none of her witnesses testified on their direct examination as to her character, or as to rumors with respect thereto, and this is the rule, even though her bad reputation has been set up in mitigation of damages: *Hanners v. McClelland*, 74 Iowa, 318.

WITNESSES, CROSS-EXAMINATION OF. — Under what circumstances a witness may be cross-examined as to collateral matters, and how far the examination may be pursued: Note to *Turnpike Road Co. v. Loomis*, 88 Am. Dec. 321, 322; and for cross-examination of witnesses generally: Note to *State v. White*, 27 Am. Rep. 140–145. Great latitude is permitted in the cross-examination of witnesses, both to impeach the witness and to test his accuracy and his *animus*: *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Sigsbee v. Minneapolis etc. R'y Co.*, 39 Minn. 8. A party who has been examined as a witness at the instance of the adverse party, prior to the trial, may also be cross-examined by him at the trial, and his testimony on such cross-examination will be competent evidence in the party's favor: *Mosier v. Stoll*, 119 Ind. 245. Yet a party cannot cross-examine his adversary's witness upon irrelevant matters merely to draw out something which he may contradict by other evidence: *Evans v. De Lay*, 81 Cal. 103; although where a fact has been positively stated on direct examination, cross-examination for the purpose of getting a restatement of the same matter is not improper: *Worden v. Humeston etc. R'y Co.*, 76 Iowa, 311. A defendant must not establish his defense by facts elicited upon the cross-examination of plaintiff's witnesses, when the matters were not raised in their examination in chief: *Bulliss v. Chicago etc. R'y Co.*, 76 Id. 680; *Sterling v. Bock*, 37 Minn. 29. On a trial for rape the prosecutrix cannot be cross-examined as to her previous chaste character: *Fry v. Commonwealth*, 82 Va. 334. When plaintiff, suing for damages for having been expelled from a train for failure to produce a ticket, testified that he had a ticket at the time of his expulsion, had not sold it or given it away, he could not properly be asked upon his cross-examination what had become of such ticket: *Louisville etc. R. R. Co. v. Maybin*, 66 Miss. 84. It is competent to ask any question on cross-examination which bears directly or indirectly upon any portion of the testimony given in chief, or which tests the credibility, knowledge, or recollection of the witness: *Sharp v. Hoffman*, 79 Cal. 405.

In criminal cases, the prosecution may show, upon cross-examination, that a witness has testified in another suit directly contrary to his testimony in

chief: *People v. Jensen*, 66 Mich. 711; but the witness has the right to have such contradictory statements, made by him upon a former trial, presented to him and read, if they were in writing: *People v. Lee Chuck*, 78 Cal. 317. Under the Penal Code of California, section 1323, the court has not the same discretion as to the extent and scope of the cross-examination of a defendant as in the case of other witnesses: *People v. Rozelle*, 78 Id. 84. It is discretionary with the court to allow or refuse a defendant in a criminal case the right to cross-examine parties who file counter-affidavits in support of a verdict which has been assailed by defendant for misconduct on the part of the jury: *People v. Lee Chuck*, 78 Id. 317. Where an accused testifies in chief about his birth, parentage, education, and business, he may be cross-examined as to whether he was ever arrested before: *People v. Fong Ching*, 78 Id. 169; so where a defendant denies the commission of the crime, he may be asked, on cross-examination, whether a letter, which tends to contradict such denial, is in his handwriting: *People v. Rozelle*, 78 Id. 84. A defendant on trial for an assault cannot be cross-examined as to other assaults committed by him, with respect to which he said nothing upon his examination in chief: *People v. Bishop*, 81 Id. 113; compare *Sharon v. Sharon*, 79 Id. 635. Where a witness for the state has testified to the good reputation of a deceased as a peaceable citizen, and denied, upon cross-examination, that he ever heard of certain difficulties in which the deceased was involved, the accused cannot prove the existence of such difficulties to impeach the witness's testimony: *Hussey v. State*, 87 Ala. 122. A witness by whom another witness is sought to be impeached as to his general character can be cross-examined as to his capacity to testify as to such character: *Clapp v. Engledow*, 72 Tex. 252.

HUSBAND AND WIFE. — Under what circumstances married persons may testify to matters criminating each other: Note to *State v. Boyd*, 27 Am. Dec. 377-381. Husband and wife are competent to testify for each other in criminal prosecutions, but are not competent witnesses for the state unless the offense is a crime or misdemeanor committed by one against the other; and this rule is not relaxed by a mere separation of the spouses: *Johnson v. State*, 27 Tex. App. 135.

A husband, as a general rule, cannot be a witness against his wife in a civil case, unless the case be a suit for divorce between the parties: *Schnabel v. Betts*, 23 Fla. 178; nor can a wife be bound by declarations or acts of her husband adverse to her interests: *Clapp v. Engledow*, 72 Tex. 252; yet when a wife asserts title under the acts of her husband, then his declarations are competent against the wife: *Hurley v. Lockett*, 72 Id. 262; and where dower is sued for in the lands of a wife, her husband, as a co-defendant, has, under the Missouri statute, such a substantial interest in the result as to make him a competent witness in the suit: *O'Bryan v. Allen*, 95 Mo. 68. When a husband negotiates a sale of land for his wife's benefit, and the deed is made to her, his subsequent admissions are not competent against her: *Jackson v. Stanley*, 87 Ala. 271.

A wife could, at common law, make complaint against her husband for his assaults upon her, and be herself a competent witness in the prosecution against him: *People v. Sebring*, 66 Mich. 705; and where it is apparent that a defendant and his wife were acting in concert in a matter, the sayings and doings of the wife can be admitted against the husband: *Edgell v. Francis*, 66 Id. 303. A wife, though again married, cannot testify as to the conversations had during her first marriage between herself and a former husband, or with her husband and third persons: *O'Bryan v. Allen*, 95 Mo. 68; but a wife is competent to testify against her husband with respect to matters which

have occurred since obtaining a divorce from him, although incompetent as to matters which happened before such divorce: *Long v. State*, 86 Ala. 36. The acts of a wife may be given in evidence against her husband as circumstances tending to criminate him, even though she herself could not be a witness against him: *White v. State*, 86 Ala. 69.

TINKER v. HURST.

[70 MICHIGAN, 159.]

BANKRUPTCY AND INSOLVENCY. — NOTE GIVEN UNDER AGREEMENT BETWEEN CREDITOR AND DEBTOR prior to the latter's discharge in bankruptcy, by which the latter is to give the former his notes for the balance of the creditor's debt, and based on no other consideration, is fraudulent and void.

William E. Henze and George W. Radford, for the appellant.

H. M. Campbell and Otto Kirohner, for the defendant.

SHERWOOD, C. J. The declaration in this cause is upon all the common counts in *assumpsit*, and specially upon a promissory note made by defendant to plaintiff for the payment of \$1,624, three years from date, with interest, and dated July 6, 1876; also for a balance due on an account of \$87.

The defendant pleaded the general issue, and gave notice under his plea that he would show the note was given without consideration, and in fraud of his composition in bankruptcy.

Trial was had in the Wayne circuit court by jury before Judge Look. The claim upon the account was admitted, and verdict and judgment were rendered for that amount for the plaintiff. His claim on the note was rejected, and he now brings error to this court.

From the testimony it appears that, on June 28, 1875, Hurst failed, and filed a voluntary petition in bankruptcy; that Tinker was a creditor to the amount of about six thousand six hundred dollars; that after filing the petition Hurst made a composition with his creditors, under the provisions of the bankrupt law, for twenty cents upon the dollar, and obtained his discharge. It was necessary for him, under the law, to procure the assent of a majority in number, and three fourths in amount, of his creditors to the composition, to make it available. Hurst claims and testifies that it was necessary for him to secure the assent of Mr. Tinker and his vote to

effect the composition; and to accomplish this he was obliged to and did agree to give Mr. Tinker three notes, one being the note in suit for the balance of his claim after the composition was carried out. The order confirming the composition was made September 28, 1875.

The defendant claimed upon the trial, and it was the theory of his counsel in the case, that he gave the note in question, with two others, in pursuance of an agreement made with the plaintiff before the requisite number of creditors had been secured to the composition, whereby the plaintiff should consent to the same, and after the composition was made and concluded, he should have said notes for the balance of his debt; that such agreement was the sole consideration for the note, and it was therefore void.

On the other side, the plaintiff testifies, and it is his theory of the case, that the note in suit was given to him voluntarily by the defendant; that he wanted to pay his indebtedness to the plaintiff, and recognizing his moral obligation so to do, long after the composition had been made, and the proceedings closed, he voluntarily came to the plaintiff, and proposed to pay the balance of the indebtedness as soon as he could; that the plaintiff never asked him to pay the balance; that he never made any such agreement with the defendant as he claims; and that he delivered over to Mr. Hurst, when the notes were given, some collaterals he held to secure a portion of the defendant's original indebtedness to him. Upon these two theories the cause was tried.

At the close of the trial the court charged the jury as follows: "If you find that the note in question was given in pursuance of an agreement with Mr. Tinker, the plaintiff, made prior to the composition with Mr. Hurst's creditors in bankruptcy, by which the defendant was to give the plaintiff his notes for the balance of plaintiff's debt, and was based on no other consideration, such an agreement would be fraudulent and void, and the note given in pursuance of such an agreement would be void." The jury found specially that such was the fact.

The charge raises the material question in the case. We are satisfied the circuit judge charged correctly in this case. The question is not a new one. It has frequently been before the courts, and in every case which has fallen under observation it has received the same solution. Lord Kenyon, in *Cockshott v. Bennett*, 2 Term Rep. 763, placed his decision on the true

ground, and which we regard as impregnable. Speaking of the creditors in a similar case, he said: "They all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed."

And as to the revival of the debt by a subsequent promise, the learned chief justice said: "Contracts not founded in immoral considerations may be revived; . . . but this transaction is bottomed in fraud, which is a species of immorality, and not being available as such, cannot be revived by a subsequent promise": *Cockshott v. Bennett*, 2 Term Rep. 763; *Britten v. Hughes*, 5 Bing. 460; *Jackson v. Lomas*, 4 Term Rep. 166; *Sadler v. Jackson*, 15 Ves. 52; *Payne v. Eden*, 3 Caines, 213.

In the case of *Wiggin v. Bush*, 12 Johns. 305, 7 Am. Dec. 324, Mr. Justice Yates declared "that the policy of the law forbids such transactions, and that the giving of a note afterwards secretly would alone be sufficient to prevent a recovery upon it." See also *Tuxbury v. Miller*, 19 Johns. 811; *Case v. Gerrish*, 15 Pick. 49; *Fenner v. Dickey*, 1 Flip. 44; *Baldwin v. Rosenman*, 49 Conn. 105; *Blasdel v. Fowle*, 120 Mass. 447; 21 Am. Rep. 533; *Russell v. Rogers*, 10 Wend. 478; 25 Am. Dec. 574; Leake on Contracts, 767.

Many more cases might be cited, but the foregoing are sufficient.

Enough appearing to show that the plaintiff has no right of action upon the note relied upon, it is unnecessary to consider the other assignments of error.

The judgment must be affirmed.

BANKRUPTCY. — Effect of a promise to pay a debt discharged by bankruptcy: Note to *Earnest v. Parke*, 27 Am. Dec. 287-289; note to *Knapp v. Hoyt*, 42 Am. Rep. 60, 61. A note made by a bankrupt two days before filing his application, purporting to be made by him for cash advances in good faith, to enable him to take the benefit of the bankrupt law, and without which it would be impossible for him to do so, is barred by his discharge: *Nelson v. Stewart*, 54 Ala. 115; 25 Am. Rep. 660. A secret promise by the debtor to one of the creditors, who unite in a composition agreement, to pay him more than the others, upon condition that he will consent to the composition, is void, and this rule is applicable to compositions in bankruptcy proceedings: *Carey v. Hess*, 112 Ind. 398. Compare *Harrison v. Gamble*, 69 Mich. 96; *Craig v. Seitz*, 63 Id. 727.

BAKER v. OHIO FARMERS' INSURANCE COMPANY.

[70 MICHIGAN, 199.]

INSURANCE — MISREPRESENTATIONS OF AGENT BINDING UPON COMPANY. —

Where an insurance agent fills out and signs an application for insurance without the authority or knowledge of the applicant, in which he states that the property is unencumbered, although the applicant, in a prior oral application to him for insurance, told him that there was a mortgage on the property, the company is bound, though the policy provided that it should be void for any false representation made in the application. In such case the company, by issuing the policy and accepting the premium, must be held to have waived a written application by the assured, and to have taken the insurance with the encumbrance on the property.

John D. Conely, for the appellant.

D. P. Foote, for the plaintiff.

MORSE, J. The undisputed facts in this case are these: The plaintiff lives in the city of Saginaw, where she owned a lot having a dwelling-house and barn thereon. Upon these premises was a mortgage dated December 31, 1884, and given for nine hundred dollars. Upon May 24, 1886, there was about six hundred and eight dollars due upon it. Upon that day there was issued to her a policy of insurance in the defendant company, insuring the house for twelve hundred dollars, and the barn for three hundred dollars, against loss or damage by fire, for a period of forty-five days. June 20, 1886, the house was wholly destroyed by fire, and the barn injured to the extent of thirty-five dollars. The company refused to pay the loss, and she brought this suit.

The policy referred to an application, describing it as an "application and survey No. 1234." The word "No." and the figures "1234" were in writing. The policy declares that the application forms part of the policy, and it states that "upon any false representation by the assured of the condition, situation, or occupancy of the property, . . . or any misrepresentation whatever, . . . this insurance shall be void."

It also contains the following provisions: "It is expressly agreed that this company shall not be bound by any act or statement made to or by the agent or other person which is not contained in the written application or indorsed on this policy. And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms, and to

conditions printed on the back of this policy, which are hereby declared to be part of this contract."

On the back of the policy are certain printed conditions, of which the second is as follows: "If the premises insured herein be encumbered in any way, this policy shall be void, unless . . . the encumbrance on the premises be expressed in the application."

The plaintiff never made any written application for insurance, nor authorized any one to make any for her, and did not know that any existed until the time of the trial in the court below.

One W. J. Moffitt, the local agent of the defendant at East Saginaw, solicited the insurance. He talked with the plaintiff about the insurance, was informed by her of the existence of the mortgage upon the premises, looked them over himself, concluded to take the insurance, received the payment of the premium on May 24, 1886, and told plaintiff that her property was insured from twelve o'clock, noon, of that day. He asked her whether she wanted the loss, if any, payable to her or the mortgagee. She told him to make it payable to herself. Nothing was said about any written application. A week or more after this, Moffitt, without any authority from Mrs. Baker, and without her knowledge, filled out an application in her name, and signed plaintiff's name to it. He testified that he had no authority from her to do so. It does not appear whether the application was received by the company or not before the policy was delivered to Mrs. Baker, but the policy was dated and countersigned upon the day the insurance was taken, — May 24, 1886.

Moffitt swears he delivered the policy May 25, 1886. Plaintiff swears that she did not receive it for ten or twelve days. Mr. House, the state agent, testifies that he sent the application on to the company after receiving it from Mr. Moffitt. He fails to state when he received it, or when he forwarded it. Plaintiff claims that she did not read the policy after receiving it; but this is immaterial.

The application contained the following printed question: "Is the property encumbered?" The written answer was, "None."

No written consent to this mortgage was written upon the policy, nor was any mention of it made therein. Neither was it expressed in or on the application filled out and sent on by Moffitt.

The circuit judge instructed the jury, substantially, that, the application not being made by Mrs. Baker, or by Moffitt with her knowledge and consent, she had a right to believe that the application made by Moffitt — knowing that she had made none — contained her statements as she had made them to him; and if the jury believed that she stated to Moffitt the existence and lien of this mortgage upon the premises, she was entitled to recover. She obtained judgment for the full amount of her loss and interest.

It is plain that Mrs. Baker was not bound by this application, nor do I think she was chargeable with notice of it. The learned counsel admits, as he must, that if, under the circumstances of the taking of this insurance, the company at its home office had filled out and signed this application in the name of plaintiff, without her knowledge and consent, and undertook to bind her in the policy with the terms of such application, it would have been a fraud upon her, which the law would not permit to prevail. He also admits, as he must, that in the filling out of this application Moffitt was the agent of the company, and not the agent of Mrs. Baker. These things being admitted, it follows that the filling out of this application is the act of the company, and a fraud upon the plaintiff.

The policy must stand as if no written application had been made, and that part of the policy referring to it treated as surplusage, and out of the case.

But the learned counsel insists that it was the duty of the plaintiff, when she received her policy, to read it, and know what her contract was, and when she saw an application referred to as No. 1234, that was notice to her that a written application, made by some one, was in existence, and in the possession of the company, and that if she did not wish to be bound by the statements contained in such application, it was her duty to find out from the company what such application contained, or return her policy.

I do not think so. I think the ordinary, average person receiving such policy, and knowing that he had made no written application, and that none had been required of him, would have considered the reference to such application as mere surplusage, and having no force, as far as his insurance was concerned. To be sure, the words and figures "N 1234" were in writing, but they followed the printed "survey" in the following clause: "On the following

erty, as described in application and survey No. 1234, and forming a part of this policy."

Any one would be justified, it seems to me, under the circumstances, in the belief that the No. 1234 referred to the number of the survey alone, and not to the application, when there was no application made to the knowledge of the insured.

Nothing is said about the application being a written one, although the word is used three or four times in the policy, until in the very last of the instrument, where this clause is found: "It is expressly agreed that this company shall not be bound by any act or statement made to or by the agent, or other person, which is not contained in the written application or indorsed on this policy."

This latter clause is the one mainly relied upon for the defeat of the plaintiff's action. The testimony showing that Moffitt was informed and knew of the existence of this mortgage at the time the policy was issued was objected to upon the ground that, under this clause, such testimony was not admissible, as the fact of the encumbrance was not indorsed on the policy, or expressed in the application.

As before shown, there was no written application in this case. There was an oral application, and in that application, the testimony shows, the company was apprised of the encumbrance. It was expressed in the oral application, and the company is bound by such application, and must be deemed to have waived the encumbrance.

It is argued that this clause in reference to acts and statements, not indorsed upon the policy or contained in the written application, having no binding effect upon the company, is a wise provision, and one calculated to guard against the dishonesty of agents, as well as the perjuries of claimants. But this company, receiving a written application entirely in the handwriting of the agent, even to the signature of the applicant, takes it without further inquiry, and issues a policy upon it, or consents to one already issued and delivered upon it. To allow it to thus blindly profit by the fraud of its agent, of which the assured is entirely innocent, can, however, serve no useful purpose, and would be an encouragement to the repetition of like frauds in the future, not only by this agent, but by others.

This case differs materially from those where the assured has signed the application and had an opportunity to read

over the answers written down by the agent in his behalf. There the assured, instead of the company, is guilty of negligence. Here the assured was not negligent, but the company was.

We held, in the case of *Brown v. Metropolitan Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, that if the agent obtained the signature of the assured to a blank application at her house, and then filled out the answers falsely at his office, without her knowledge, the insurance company could not defend upon the ground of the untruth of such answers. In that case the assured trusted the agent with a blank application signed by her, and there would be some reason to argue therefrom that she thereby made him her agent, as far at the filling out of the application was concerned. There would also be some force, in such a case, in the argument that it was her duty, upon receiving her policy, and ascertaining therefrom that her answers in such application were to be taken as warranties, to find out at once from the company what answers the agent had written, or be bound thereby if she saw fit to retain her policy without such inquiry. But we held, nevertheless, that the fraud of the agent could not bind her.

In the case under consideration, the assured had in no manner authorized or permitted the agent to act for her, and his act, as before shown, was the act of the company, in which she had no part or knowledge. Nor was she bound in any way to know it, or to make inquiry in regard to it.

We are not referred to any case wherein the policy of insurance contained the precise clause relied upon in the present case, to wit: "That this company shall not be bound by any act or statement made to or by the agent or other person which is not contained in the written application or indorsed on this policy."

The counsel admits that this language is comparatively new in insurance policies, but claims that his view of the case, and the effect of this clause, is sustained by the following authorities: *Michigan St. Ins. Co. v. Lewis*, 30 Mich. 41; *McIntyre v. Michigan St. Ins. Co.*, 52 Id. 188; *Cleaver v. Traders' Ins. Co.*, 65 Id. 527; 8 Am. St. Rep. 908; *Catoir v. American Life Ins. Co.*, 33 N. J. L. 487; *Moore v. State Ins. Co.*, 72 Iowa, 414; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 55; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 520.

In *Chase v. Hamilton Ins. Co.*, 20 N. Y. 55, the application

was signed by the assured, and it contained a clause expressly stating that the company should not be bound by any act done or statement made to or by any agent or other person, which was not contained in such application. As the assured signed this application, he was presumed to know the contents of it. He was, therefore, not permitted to show the knowledge of the agent, who examined the premises and wrote up the application, that it was not correct in its statements.

In *Enos v. Sun Ins. Co.*, 67 Cal. 622, the policy contained a provision "that this company shall not be bound by any act or statement which is not contained in the written application, or indorsed on this policy." It was held that the local agent could not waive any of the provisions of the policy. It does not appear from the report of the case what particular thing or point in the policy was undertaken to be waived, or in what manner, except that such waiver, whatever it may have been, was not written upon the application or the policy.

Moore v. State Ins. Co., 72 Iowa, 414, does not touch the point involved here, as will be seen by an examination of the case.

The case of *Catoir v. American Life Ins. Co.*, 83 N. J. L. 487, was one where the policy contained the following clause: "Agents are not authorized to make contracts for the company, nor to write upon the policy, except his signature, when necessary to the first receipt of premium, nor to waive forfeiture of the same." A premium was not paid in time, the result of which was to forfeit the policy, unless the plaintiff proved that the company had legally waived the payment as it became due. The plaintiff showed no waiver except that the local agent had orally consented that the plaintiff could pay it afterwards, "when he had it." The policy was upon the life of plaintiff's wife. Held, that the agent could not waive the payment in the face of this provision in the policy.

In *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, the assured signed the application, but it was claimed that he did not know it was to be a part of his policy; that one agent read the questions over, which he answered truthfully, while another agent pretended to write down his answers; that he had no reason to suppose that such answers were taken down differently from those given; that he was asked to sign the paper to identify him as the party for whose benefit the policy was to be issued, and that he signed it without reading it, and did

not read his policy when he received it, nor at any time. The answers so written were false, and not as the assured gave them. The application contained an agreement that if any of the answers were false the policy to be issued upon them was void. The court held it was "his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. . . . If he had read even the printed lines of his application he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing, and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

It will be seen that the principles laid down in these cases do not reach or govern the case at bar.

In our own state, the case of *Michigan St. Ins. Co. v. Lewis*, 30 Mich. 41, does not aid the defendant. There was a condition in the policy, not in the application, that the agent or servant of the company had no right or power to waive or to dispense with any of the terms or conditions of insurance as printed or contained in the application or in the policy, and that there should be no waiver or evasion of any of its terms or conditions, excepting that the same was done with the concurrence of the secretary indorsed on the policy, or specifically acknowledged in writing.

It was claimed, in defense of a suit upon the policy, that the same was void because of an understatement in the application of the amount due upon a mortgage upon the premises.

Judge Cooley, in speaking for the court (page 44), says: "If it were necessary to rule upon this point, it might be a question worthy of consideration whether a condition that 'there shall be no waiver or evasion of any of the terms or conditions of this policy, and no agent or servant of this company has any right or power to waive or to dispense with any of the terms or conditions of insurance as printed and contained in the application, or in this policy,' etc., is not in fairness and justice to be construed as speaking from the time when the policy is received, instead of being made to operate by relation from the date of the application, when no conditions, so far as we are informed, were brought to the knowl-

edge of the insured, except those which were made a part of the application itself. Whatever might be the strict rule of law on the subject, it would not be surprising if a party receiving a policy with such a condition contained in it should put this construction upon it, and govern his action accordingly."

If this very sensible suggestion of Judge Cooley should be taken as good law, it would dispose of the present case against the defendant, as the application filed by Moffitt contained no such condition as the one relied upon in the policy to defeat the plaintiff's claim. There is no language in the opinion of Judge Cooley in the case above noted upon which defendant's counsel can build an argument in support of his position here.

In *McIntyre v. Michigan St. Ins. Co.*, 52 Mich. 188, the provision that the agent could not waive or dispense with true answers to all questions therein contained was inserted in the application, which the plaintiff signed without fraud or mistake, and, as the court say, was not "covertly inserted," and did not "enter the contract by a back door."

The defendant's counsel admits that the case of *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, differs from the one under consideration in this, that the assured in the *Cleaver* case had his policy in his possession at the time of his conversation with the agent, while here such conversation was had at the time of procuring the insurance. It differs also in another and radical respect. In the *Cleaver* case the company waived nothing. The agent's action was claimed to be a waiver, but the policy expressly provided that the agent had no authority to waive or modify the contract. In the case at bar, as before shown, the company was, by issuing a policy upon an application not signed by the assured, and made without her knowledge and consent, estopped from holding Mrs. Baker to the statements made therein, upon the principle that it would be a fraud upon her to do so, and must be considered as taking her insurance upon an oral application, with knowledge of the statements made by her upon such application, and in thus issuing the policy the company must be held to have waived a written application by her, and to have taken the insurance with the encumbrance upon the premises as stated by her to the agent, who in taking such application was its agent, and not hers. The fraud of the agent was not her fraud, nor was she in any respect negligent. The company was negligent, and must suffer, rather than Mrs. Baker, for taking and acting

upon an application wholly, signature and all, in the handwriting of an agent, whom it declined in the express provisions of its policies to trust.

The judgment of the court below must be affirmed, with costs.

INSURANCE — MISREPRESENTATIONS OF AGENT. — Generally, statements, declarations, and misrepresentations, made by the agent of an insurance company, are binding upon the company: *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 8 Am. St. Rep. 894, and note; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908, and note; so where an agent of the company makes out an application for insurance, having full knowledge of the facts, the company cannot urge, in defense of an action for losses sustained, that the statements made in such application were false: *Ment v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158, and note 162, 163; compare *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and extended note. Where an ignorant person, unable to read or write in the English language, procured insurance upon her property, in which she had the dower interest, and her children the fee, and she did not know the distinction between dower interest and fee, and was ignorant of what the policy contained, where, by its provisions, it was stipulated that the policy should be void if the assured was not the owner in fee-simple of the property insured, she having made no representation as to the nature of her interest in a written application or otherwise, and the agent, with full knowledge of the facts, having made out the policy, the policy was valid and enforceable as to her interest: *Hartford Ins. Co. v. Haus*, 87 Ky. 532. So where an agent authorized to issue insurance policies is informed by the applicant that the property sought to be insured is situated upon the right of way of a railroad, and he writes "yes" as an answer to the question, "Do you own the land in fee-simple?" such misrepresentation is binding upon the company, and will constitute a waiver of the condition in the policy as to forfeiture for misrepresentations as to the title of property: *National Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161.

PEOPLE v. GOULD.

[70 MICHIGAN, 240.]

CRIMINAL LAW — EFFECT OF PLEA OF GUILTY. — Voluntary plea of guilty, tendered by the accused upon his preliminary examination, is such confession of guilt as may be submitted to the jury upon the trial, in connection with his confessions made to others and the circumstances surrounding the case, as tending to establish the *corpus delicti*.

CRIMINAL LAW — SEDUCTION — EFFECT OF MARRIAGE. — Where seduction is accomplished under promise of marriage, and the promise has been kept, no prosecution or conviction can be had after the marriage, and the question of good faith on the part of the man in entering into such marriage cannot affect the question of his guilt or innocence.

Moses Taggart, attorney-general, and S. F. Smith, prosecuting attorney, for the people.

Turner and Turner, for the respondent.

LONG, J. The respondent in this cause was convicted in the circuit court for the county of Shiawassee for seducing and debauching one Kate Morrow, and brings the case here on writ of error.

The action was brought under section 9283, Howell's Statutes, which provides "if any man shall seduce and debauch any unmarried woman, he shall be punished by imprisonment in the state prison not more than five years," etc.

The information charges "that on October 10, 1886, at the township of Shiawassee, in the county of Shiawassee [said William], did seduce and debauch one Kate Morrow, she, the same Kate Morrow, being then and there an unmarried woman," etc. The cause was tried before a jury.

It appeared, on the trial of the case, that, on April 19, 1887, said Kate Morrow made complaint, under Howell's Statutes, section 9283, before George A. Parker, a justice of the peace of the township of Shiawassee, in said county, charging the respondent with seducing and debauching her. A warrant was issued on said complaint; the respondent was arrested and brought before said justice, and the examination set down for April 27, 1887. On said day the case was called, the respondent being present, and a recess taken to one o'clock in the afternoon of the same day. During such recess the respondent sought and obtained an interview with Kate and her mother, and finally went to their home, where Kate and respondent were married, during such recess, by Mr. Carruthers, a justice of the peace of said township. On the afternoon of the same day, about seven o'clock, the respondent took the east-bound train for Port Huron, and deserted and abandoned his wife, and did not live or cohabit with her after said marriage, nor did he return to said county of Shiawassee till brought there under arrest as a disorderly person, under Howell's Statutes, section 1985.

No further proceedings were had under the complaint made by Kate Morrow on April 19, 1887; but subsequently, and in September, 1887, Sarah J. Morrow, the mother of Kate, made complaint against respondent, before said Justice Parker, and respondent was held to trial in the circuit court for said county, and the information upon which the respondent was convicted in this cause was filed, under said last-mentioned complaint, on December 21, 1887.

It further appeared upon the trial, and before any testimony

was offered, that counsel for the respondent made the following request: —

“Respondent’s counsel: Before proceeding to trial, I ask leave to file, not as evidence, but simply as the expression of the wish, the affidavit of the wife of the respondent, the woman he is charged with seducing, to the effect that she is not instrumental in this prosecution, and that she does not desire it to proceed.

“The Court: You can file it.”

Testimony was then given showing that Kate was an unmarried woman on October 10, 1886, the date on which the offense was alleged to have been committed; that on July 22, 1887, she gave birth to a child; that she never was married till she was married to respondent on April 27, 1887; and that the respondent had been arrested under a complaint made by Kate for seducing and debauching her before said marriage, and was still held under arrest for said offense at the time of the marriage.

The only testimony given on the trial to prove the *corpus delicti* was the confession of the respondent made to Sarah J. Morrow, the mother of Kate, and to others, just before and after his arraignment on the complaint made by Kate, in which respondent stated “that the child was his, and that he had promised to marry Kate, and do what was right.”

It also appeared that, on his arraignment before the justice under said complaint, he pleaded not guilty, but subsequently made a request of the justice to be allowed to withdraw his plea of not guilty, and to plead guilty thereto.

At the close of the testimony, counsel for respondent requested the court to charge the jury as follows: —

“1. The validity of the marriage between the respondent and said Kate Morrow cannot be attacked by the prosecution in this case.

“2. The proof introduced on the part of the prosecution in this case, as to the statements made by respondent as to his being guilty of the offense charged, are competent for what they are worth, but do not constitute a *prima facie* case for the people.

“3. If the jury find, from the evidence in this case, that at the time the respondent was arrested the first time upon the charge of seduction, he was at that time arraigned before the justice, and pleaded not guilty, and upon his marrying the girl (Kate) he was charged with seducing, he was discharged by

said justice, and said prosecution was at that time ended, the people in this case have no standing in court in this prosecution against defendant, as the first one, upon which the respondent was discharged, is a complete bar to this prosecution, if they further find that both were brought for the same offense.

“4. If the jury find, from the evidence in this case, a valid marriage between respondent and Kate Morrow anterior to this prosecution, the respondent should be discharged.

“5. From the evidence in this case, the verdict of the jury must be not guilty.”

The court refused to give defendant's requests in charge to the jury except the first, and it is the refusal of the court to give the remainder of said requests upon which defendant's counsel base their several assignments of error.

The court could very properly refuse the respondent's second request. While it was not necessary for the justice to take respondent's plea, the case being one which the justice had no power to try and determine, yet, the respondent having voluntarily tendered his plea of guilty, it was such a confession of his guilt, which, taken with his confessions made to others and the circumstances surrounding the cases, might very properly be submitted to the jury for their consideration, and which, under the circumstances of this case, might be sufficient proof of the *corpus delicti*.

The court voluntarily charged the jury, among other matters, as follows: “On this subject of marriage, I charge you that if the marriage (and there is no dispute about that) took place with the intention on respondent's part at that time to perform in good faith all the duties which the relation of marriage imposed, and which naturally grew out of such relation, then the complaint would not be warranted; but if the marriage was resorted to as a piece of legal trickery to stop the voice of the girl, Kate, and prevent her from being a witness, with the intention, fixed and determined on in his mind at that time, not to live with her, nor to assume any of the duties and obligations of the marriage relation, and with the intention to abandon this girl, then the offense would be one against public decency and order, and would not be condoned by such marriage, and would be subject to prosecution.”

We do not agree with the learned circuit judge in what he states the law to be, or in the reasons which he gives for so holding. Under this charge the jury were told that the guilt

or innocence of the respondent must be made to depend, not upon the facts which go to make up the offense charged,—the seducing and debauching, and, as in this case, the surrender by Kate Morrow of her person to the respondent, in reliance upon his promise of marriage,—but upon the good faith or want of good faith of the respondent in entering into the marriage relation with her after the offense with which he was charged was committed.

It would not be claimed that had the respondent married this girl at any time previous to the complaint being made against him, public policy or public decency would have required his prosecution. But, on the other hand, it will be conceded that public morals and public decency would be much better subserved by the marriage of the parties in this class of cases, as well as in bastardy proceedings under the statute, and thus make legitimate the children begotten by such illicit intercourse, and save, in part at least, the shame and disgrace of the injured female. The statute, in other sections, provides some punishment for the offense of deserting and abandoning the female after such marriage.

The *gravamen* of the offense, under the statute under which respondent was convicted, is not the mere fact of intercourse. Two elements enter into it, and both must concur and exist at the same time,—seduction and debauchery; and if there is no such concurrence, the offense would not be complete. Debauchery and carnal intercourse, without seduction, is no offense under this statute. The offense which this statute is aimed at is the seduction and debauchery accomplished by the promises and blandishments the man brings to his aid in effecting the ruin and disgrace of the female; and where the seduction and debauchery is accomplished by promises of marriage, upon which the female relies, and thus surrenders her person, and gives to the man the brightest jewel in the crown of her womanhood, it is the broken promise which the law will regard as the *gravamen* of the offense. It must, therefore, be held that where seduction and debauchery is accomplished under promise of marriage, and the promise has been kept and performed, no prosecution can be allowed or conviction had after such marriage; and the question of the good faith or want of good faith upon the part of the man in entering into such marriage cannot enter into the question of his guilt or innocence. The promise has been kept and performed, and it would be against public policy and public decency to

permit prosecutions to be carried forward in the courts of justice thereafter.

This question came before the courts of Pennsylvania in *Commonwealth v. Eichar*, 4 Pa. L. J. 326. In that case, Knox, P. J., delivering the opinion of the court, says: "Can he now be convicted and punished for her seduction before marriage? It is not the carnal connection, even when induced by the solicitation of the man, that is the object of this statutory penalty, but it is the seduction under promise of marriage, which is an offense of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Clearly not, but a false promise, broken and violated after performing its fiendish purpose. The evil which led to the enactment was not that females were seduced, and then made the wives of the seducers, but that, after the ends of the seducer were accomplished, his victim was abandoned to her disgrace. An objection to this construction is, that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than, by a contrary construction, to remove the inducement to a faithful adherence to the promise which obtained the consent." See also 2 Archbold's Criminal Pleading and Practice, 1825, tit. Seduction.

Prosecutions under similar statutes in New York are prohibited by statute after the marriage of the parties: 3 N. Y. Rev. Stats., 5th ed., 942.

We think this better reasoning than that of the learned circuit judge before whom this case was tried.

The respondent's fifth request to charge should have been given. It follows that the verdict and judgment of the court below must be reversed, and set aside, and the respondent discharged.

In *People v. Gibbe*, 70 Mich. 425, the respondent, a married man fifty-six years of age, and a near neighbor of the injured girl, was charged and convicted of seducing and debauching, on March 31, 1886, one Annie Bunn, an unmarried female, at that time under fifteen years of age, living with her parents. At the trial, evidence was introduced tending to show that the prisoner began his familiarities with the girl more than a year before the commission of the act charged; that he habitually visited the house of her parents when they were absent, and played with the children, frequently making the injured girl presents, thus gaining her friendship and confidence, and on several occasions forcing her into a bedroom, attempting to accomplish his criminal purpose, which was resisted by force, until such purpose was finally accomplished on the occasion charged, with the consent of the girl.

This evidence was admitted, against objection, and in referring thereto the appellate court said the seduction "consisted of the means used by him to induce this young girl to yield and surrender to him her chastity and her virtue, and such means always include all the acts, artifices, influences, promises, enticements, and inducements calculated, under all the circumstances of the case being considered, to accomplish that object; and all testimony having any tendency to establish any of these should be admitted when offered to prove the criminal conduct. In all such cases, the age, experience, artfulness, and blandishments of the offender, and the youthfulness, innocent, guileless, and confiding nature of the injured party, will always be found to enter largely into the consideration of the acts of the parties involved in the investigation; and the largest latitude consistent with safety should be allowed in taking the testimony having any tendency to develop the material facts in the case. A proper regard for the protection of female virtue, and the welfare of society, can never require less. The record tends to show that at first force as well as strategy was used by the respondent in bringing this child within his seductive grasp, for the purpose of exciting in her impure and carnal desires. The testimony of the girl is to the effect that while she, at all times, opposed and resisted the respondent's lecherous approaches, she did, on the last occasion, after he had got her into the bedroom at her father's house, yield to his seductive influence and persuasions; that on this occasion he promised that he would buy her clothing, which he never did, but that he finally succeeded in making complete his crime." In relation to the promise to buy the girl clothing, the court below charged in effect that if the jury believed that the girl yielded solely on account of the promise of the accused to buy her a silk dress, this, by itself, would show no such inducement as would seduce a woman of previously chaste character, but if it were found that she was of previous chaste character, and that the making of the promise of such dress, or any other promise, on any occasion, was simply one of the many means employed to overcome her virtue, this would be one of the means which the jury would have the right to consider as having been employed for the purposes of this seduction. In passing upon the question whether the means employed were such as would be likely to induce a woman of previous chaste character to yield to the sexual embraces of a man, the jury may consider the relations existing between the parties, their respective ages, and the age of the girl at the time, the making of gifts or promises of gifts, and then it may say whether at the time the woman was chaste, whether arts were practiced, and whether she was seduced and robbed of her virtue by these means. The court then proceeded to say that "a false promise of marriage, under our statute, is not a necessary element in the influence exerted through the wiles, artifice, and deception used by the seducer in taking advantage of the guileless simplicity and confidence of a young girl, and leading her from the path of virtue in depriving her of her chastity, and accomplishing her ruin; but any other subtle device or deceptive means, involving the same moral turpitude, used by him in accomplishing the same criminal result, is all that is necessary to constitute the crime. The quality of the means used, rather than the kind, is that which characterizes the act and brings it under the condemnation of the law."

The judgment of the lower court was affirmed.

CRIMINAL LAW. — As to when and under what circumstances confessions are admissible in evidence: Extended note to *Nolen v. State*, 46 Am. Rep. 253-250; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501, and note; *Daniels v. State*, 78 Ga. 98; 6 Am. St. Rep. 238, and extended note. To be

admissible, a confession must be free from inducement, "either from the flattery of hope or the torture of fear": *Corley v. State*, 50 Ark. 305; and the admissibility of confessions is a mixed question of law and fact for the court to determine: *Id.*; *State v. Kinder*, 96 Mo. 548. Where an officer tells a prisoner that "there is only one way out of this, and that is, to tell the truth," and the prisoner thereupon confesses the homicide, under the Indiana statutes the confession can be given in evidence against him: *Benson v. State*, 119 Ind. 488; but the confession of an accused person made by him while under restraint, or extorted by violence or persuasion, cannot be given in evidence against him: *Brown v. State*, 26 Tex. App. 308. An extrajudicial confession may be used to corroborate the testimony of an accomplice: *Patterson v. Commonwealth*, 86 Ky. 313.

SEDUCTION. — As to the law relating to actions for seduction: Extended note to *Weaver v. Bachert*, 44 Am. Dec. 162-178; note to *State v. Carron*, 87 Id. 405-411.

SEDUCTION. — The marriage of the parties subsequent to the seduction, although followed by the desertion of the husband, is a good defense to a criminal prosecution for the crime: Note to *State v. Carron*, 87 Am. Dec. 409.

SEDUCTION, THE CRIME AS DEFINED by the statutes of the various states: Note to *People v. De Fere*, 8 Am. St. Rep. 870-872.

MORRISON v. ESTATE OF SESSIONS.

[70 MICHIGAN, 297.]

ADOPTION IS THE ACT BY WHICH RELATIONS OF PATERNITY and affiliation are recognized as legally existing between persons not so related by nature.

EFFECT OF ADOPTION IS TO CAST SUCCESSION ON THE ADOPTED CHILD in case the adopting father dies intestate. The change of name is more an incident than an object of such proceedings.

ADOPTED CHILD MORE THAN SEVEN YEARS OF AGE at the time of his adoption will be presumed to have assented thereto, if for his benefit, unless his dissent expressly appears.

IN INTERPRETING WILLS, the cardinal principle is, to arrive at and carry out the intention of the testator, if it is lawful.

WILLS — ADOPTED CHILD — CONSTRUCTION OF WORDS "LAWFUL HEIRS." — Where a testator bequeaths his property to his "lawful heirs," it will be held that he intended to include only a class upon whom descent of property is cast by the statutes of descent, and not to include an adopted child as one of his heirs.

Mitchel, McGarry, and Hanchett, for the appellants.

Lemuel Clute and B. F. Graves, for the claimant.

CHAMPLIN, J. This is an appeal from the judgment of the circuit court affirming an order of distribution of the probate court, by virtue of which the claimant has been determined

to be sole heir at law of Amasa Sessions, deceased, and entitled, under the provisions of his will, to the larger portion of his estate.

The controversy involves the consideration of two questions: 1. The validity of the proceedings in the probate court of Ionia County relative to the adoption of the claimant by Amasa Sessions, and constituting her his heir; 2. The construction and interpretation of the last will of Amasa Sessions.

The proceedings in the probate court were taken under and by virtue of act No. 26, Laws of 1861, which reads as follows:—

“An Act to provide for changing the names of minor adopted children, and of other persons.

“Section 1. The people of the state of Michigan enact that whenever any person shall have adopted any minor child, with the consent of the surviving parent or the parents of such child, or, in case of orphanage, with the consent of the nearest of kin to such child, or of the principal officer of a public or incorporated orphan asylum of which such child may have been an inmate, or of two of the superintendents of the poor, or the directors of the poor, or of any authorized officers or agent of any institution, public or private, in this state or elsewhere, in whose care such orphan child may have been, and if such child be above the age of seven years, then with the consent of such child, and shall desire to change the name of such child, and to bestow upon him or her the family name of the person adopting such child, with intent to make such child his or her heir, the said person, together with his or her wife or husband, if any there be, and the surviving parent or next of kin of such child, or such officer of a public or incorporated orphan asylum, or superintendent or directors of the poor, or any authorized officer or agent of any institution, public or private, in this state or elsewhere, may make under their hands an instrument in writing, whereby they shall declare that such child, naming him or her by the name he or she has usually borne, is adopted as the child of such person or persons first above referred to, and that he, she, or they intend to make such child his, her, or their heir, and stating the full name they desire such child shall bear; and the execution of the said instrument shall be, by the persons so signing the same, acknowledged before any officer authorized by law to take acknowledgments of deeds, and thereupon

the same may be presented to and filed with the judge of probate of the county where such person or persons adopting such child reside.

“Such probate judge, on being satisfied of the good faith of such proceeding, and that the person or persons adopting such child is or are suitable to have charge thereof, shall make an order, to be entered in the journal of the probate court, that such person or persons do stand in the place of a parent or parents to such child, and that the name of such child be changed to such name as shall be so designated in said instrument for that purpose; whereupon said child shall be thereafter known and called by said new name, and the said person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child-in-law, and be liable to all the duties and entitled to all the rights of parents thereto; and such child shall thereupon become an heir at law of such persons, the same as if he or she were in fact the child of such person or persons.

“Sec. 2. The probate court of any county of this state shall have power, by an order to be entered on its journal, to change the name of any adult person who has been one year a resident of such county, who may apply to such court in writing for that purpose, upon such person showing a sufficient reason for such proposed change, to the satisfaction of such court, and that such change is not sought with any fraudulent or evil intent; and provided, that notice of intention to make such application shall be published six weeks prior to the making of such application, and for three successive weeks, in a newspaper printed and published in said county where the application is to be made, if there be one, or in a newspaper printed and published in an adjoining county, or in the nearest county in which a newspaper is or may be printed and published.

“Sec. 3. Such probate judge shall require of the person making the application, under the second section of this act, to pay over to the county treasurer, for the use of the county, a fee of three dollars, and shall furnish to such applicant, if desired, a certified copy of the order made in such matter.

“Sec. 4. This act shall take effect immediately.

“Approved February 2, 1861.”

Amasa Sessions and his wife had brought up in their family the claimant's mother. In February, 1865, she married one George W. Hendryx, and on April 30, 1866, claimant was

born. In November, 1866, claimant's mother filed a bill for divorce against her husband. In her bill she alleges that her husband left her a few months after their marriage; and when she next heard from him, he was under arrest in Bureau County, Illinois, for larceny; and that on August 15, 1866, he was, by the circuit court of that county, sentenced to be imprisoned and confined in the state penitentiary at Joliet, in said state, for the term of three years; one day of said term to be solitary confinement on a diet of bread and water, and the remainder of the term to be at hard labor. She prayed for the custody and control of their child, May Hendryx. Such proceedings were had in this suit that a divorce was decreed, and she was awarded the care, custody, and control of the infant, May Hendryx, during minority.

Later, and in 1868, claimant's mother was again married, to John E. Morrison, and the claimant was called and known as May Morrison, and has ever since been known and called by that name.

Amasa Sessions and his wife, Emily Sessions, being childless, took steps, in 1873, to adopt the child, May Morrison, under the act aforesaid, and the following proceedings were had: On May 9, 1873, the claimant's mother, then Mary E. Morrison, together with Amasa and Emily Sessions, executed, under their hands and seals, and duly acknowledged, the following instrument: —

“This indenture, made the ninth day of May, 1873, between Mary E. Morrison, of the township of Berlin, in the county of Ionia, and state of Michigan, mother and surviving parent of May Hendryx, aged seven years on the thirtieth day of April, 1873, and Amasa Sessions and Emily Sessions, his wife, of the township of Ionia, county of Ionia, and state aforesaid, witnesseth, —

“That whereas, the said Amasa Sessions and Emily Sessions have adopted the said child, May Hendryx, with the consent of the said Mary E. Morrison;

“And whereas the said Amasa Sessions and Emily Sessions desire to change the name of said child, and bestow upon her their family name, with intent to make her their heir, —

“Therefore, we, the said parties, Mary E. Morrison of the one part, and Amasa Sessions and Emily Sessions of the other part, do declare that the said child, May Hendryx, is adopted as the child of the said Amasa Sessions and Emily Sessions and that said Amasa Sessions and Emily Sessions inter

make such child their heir, and that she shall bear the name of May Sessions.

"Witness our hands and seals, at Ionia, Michigan, this day and year first above written.

"MARY E. MORRISON. [L. s.]

"AMASA SESSIONS. [L. s.]

"EMILY SESSIONS." [L. s.]

This instrument was duly acknowledged.

This instrument was presented to the judge of probate of Ionia County, and thereupon the following order was entered in the journal of said court: —

"State of Michigan, }
County of Ionia, } ss.

"At a session of the probate court for the county of Ionia, held at the probate office in the city of Ionia on Monday, the twelfth day of May, in the year 1873.

"Present: William H. Woodworth, judge of probate.

"In the matter of the adoption of May Hendryx by Amasa and Emily Sessions, and changing her name to May Sessions.

"Upon reading and filing in this court the declaration of Amasa Sessions and Emily Sessions, his wife, of Ionia, Michigan, duly signed, sealed, and acknowledged, thereby declaring that they have adopted a child, May Hendryx, of the age of seven years, the child of Mary E. Morrison, of Berlin, in said county of Ionia, parent of said child, now surviving, by and with the consent of the said Mary E. Morrison, duly signed, sealed, and acknowledged by her, and filed in this court, with the intent to make said May Hendryx the heir at law of said Amasa Sessions and Emily Sessions, and desiring that said May Hendryx may hereafter, as such adopted child, bear their family name, and be called May Sessions; and it satisfactorily appearing to the court of the good faith of these proceedings, and that the said Amasa Sessions and Emily Sessions are suitable persons to have charge of said child, —

"Therefore, it is ordered that said Amasa Sessions and Emily Sessions do hereafter stand as parents to said child, and that the name of said child be called May Sessions, and that said Amasa Sessions and Emily Sessions shall be liable for all the duties and entitled to all the rights of parents of said minor child, and that said child, May Sessions, become the heir at law of said Amasa Sessions and Emily Sessions, the same as if she was indeed their own child."

The probate journal showed that the order of adoption, and

another order following it, constituted the proceedings of the day as entered in the journal, the last order being duly signed; but the order of adoption, which preceded it, was not signed by the judge of probate, except as his signature to the proceedings of the day embraced all entered on that day.

May resided in the family until the death of Emily Sessions, which occurred July 6, 1873. This broke up the family, and Mr. Sessions went to live with his nephew, Henry C. Sessions, and May returned to her mother, Mrs. Morrison.

In 1875, Amasa Sessions was married again, to Elizabeth E. Tubbs. May Morrison never lived in the family of Mr. Sessions after the death of Emily Sessions.

On February 2, 1874, application was made to the same judge of probate who had made the order adopting the child, for a revocation of said order; and the following journal entry was made:—

“At a session of said court, held at the court-rooms in the city of Ionia, in said county of Ionia, on the second day of February, A. D. 1874.

“Present: Hon. William H. Woodworth, probate judge.

“In the matter of May Sessions, a minor child of Mary E. Morrison, heretofore, to wit, on the ninth day of May, 1873, adopted by Amasa Sessions and Emily Sessions, as more fully appears by the records, heretofore, to wit, on the twelfth day of May, entered in this court in this behalf.

“Now comes Amasa Sessions and Mary E. Morrison, by their petition duly signed, sealed, and verified by their said oaths, setting forth, among other things, that on the ninth day of May, 1873, said petitioners, with Emily Sessions, wife of Amasa Sessions, entered into an indenture, after praying the judge of probate to enter an order changing the name of the daughter of Mary E. Morrison, to wit, May Hendryx, to May Sessions, and to constitute her heir at law of Amasa Sessions and Emily Sessions, which order was granted, and that afterwards, to wit, on the sixth day of July, 1873, Emily Sessions, wife of Amasa Sessions, died, and in consequence thereof said Amasa Sessions is unable to have the control and custody of said child, and praying that said order changing the name of May Hendryx to May Sessions, and constituting her heir at law of Amasa and Emily Sessions, may be set aside and held for naught.

“And after maturely considering the proofs and allegations of the petitioners, and it satisfactorily appearing to th

that the facts set forth in said petition are true, and that the prayer of said petition in that behalf ought to be granted, it is hereby ordered, adjudged, and decreed that the order of this court heretofore entered in this behalf, to wit, on Monday, the twelfth day of May last past, is hereby revoked, set aside, and shall be held for naught.

“WILLIAM H. WOODWORTH, Judge of Probate.”

On July 15, 1879, Amasa Sessions made his last will, in which, after making bequests to his wife, sister, and nephew, is the following:—

“4. After all the before-mentioned legacies have been fulfilled, I give and bequeath the remainder of my estate to my lawful heirs.”

Amasa Sessions died in 1886. He was childless, and left surviving him his wife, Elizabeth; his brothers, Job S., John, and Alonzo; his sisters, Elizabeth P. Arthur and Jane M. Yates; and the children of his deceased brothers, George and Darius, and of his deceased sister, Sila, who claim under the will as his heirs. May Morrison also claims the residuum of his estate as his sole heir under the fourth clause of the will.

Application was made by the administrator with the will annexed to the probate court for an order determining who were the heirs of Amasa Sessions, and for distribution. Upon the hearing, the probate court adjudged and decreed “that the said May Sessions is the sole heir of said deceased, and that all of the real estate belonging to the estate of said deceased is vested in said heir, subject to the homestead and dower rights of said Elizabeth T. Sessions, widow of said deceased, to have and to hold forever.”

It is this action of the probate court which we are asked to review.

The constitutionality of the act is drawn in question by counsel for appellants, but we do not find it necessary to pass upon that, as it is not necessary to a disposition of the case, and it is only when it is so that we will review legislative action.

“Adoption” has been defined to be the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. A proceeding which so materially affects the succession of property and the rights of natural heirs is a very important one. It is not recognized by the common law of England, and exists in the

United States only by special statute. Only a few of the states have ingrafted it upon their jurisprudence. But among many of the continental nations it has been practiced from the remotest antiquity. It appears to have been a necessary concomitant of the type of archaic society when the family constituted the unit of the community, and was an important factor in developing society into the broader community called the state. Mr. Maine, in his work of *Ancient Law*, says: "We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between the real and adoptive connection."

It flourished and was regulated by laws in both of the classical nations of antiquity.

In Greece, in the interests of the next of kin whose rights were affected by the case of adoption, it was provided that the registration should be attended with certain formalities, and that it should take place at a fixed time, the festival of Thargelia.

In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, but he reduced the system to a code, which simplified the proceedings, and from which modern legislation upon the subject has derived its principles, and adapted them to our civilization and wants.

It either required an imperial rescript or a proceeding before a magistrate to accomplish the purpose. Where resort was not had to an imperial rescript, if the person to be adopted was *alieni juris*, the parties appeared before a magistrate, and executed a deed in his presence, "declaring the fact of adoption; the parties to the adoption — that is, the person giving, the person given, and the person receiving — being personally present to give their consent. But it was sufficient if the consent of the party adopted were expressed by his not declaring his dissent, — *non contradicente*": Sandars's *Just. Inst.* 103 et seq.

The effect of adoption was to cast the succession on the adopted in case the adopting father died intestate. Some other consequences followed on the changed relation, but sufficient has been noticed to show that the real object of such proceedings is to change the succession of property of persons dying

intestate, and to create relations of paternity and affiliation not before recognized as legally existing, and that the change of name is more an incident than the object of such proceedings. Our statute has the same object, and no one can fail to see the similarity of the proceedings required by it and the regulations of Justinian above quoted.

Objection is made that the record nowhere discloses that May Morrison, being more than seven years of age, gave her consent to the proceedings. As seen above, the civil law presumed the assent of the minor unless his dissent expressly appeared. If the proceeding was one that was beneficial to the minor, and the court was satisfied upon that point, her assent would be presumed upon well-recognized principles. That it was for the benefit of the minor to be adopted into the family of Mr. Sessions at the time the proceedings were had, there can be no doubt.

It is no less certain that the unexpected change in the family of Mr. Sessions by the death of his wife changed altogether his plans and prospects for the future, and rendered it better that the child, May, should return to the care and protection of her mother. Mr. Sessions and her mother, with the aid of the probate court, attempted in good faith, no doubt, to undo what had been done towards the adoption of the child. It may have been, and probably was, unauthorized by law, but still it is significant when considered with reference to the will afterwards made by Mr. Sessions. We think it may be considered as settled, under the facts and circumstances of this case, that Mr. Sessions, from the time of the order revoking the order adopting the child, fully believed and regarded May Morrison as no longer his child or heir. If he had died intestate, and she were here claiming a distributive share as heir, we should feel obliged to pass upon all the questions raised. But he left a will, and the only question is the proper construction of that will. The cardinal principle in the interpretation of wills is to arrive at and carry out the intention of the testator if it is lawful.

Having the evidence before us which convinces us that, at the time he made the will, and after, he did not regard May Morrison, the appellee, as his heir, it is clear that he did not intend to include her in the distribution of his estate under the fourth clause of his will. The testator used the term "lawful heirs" in its ordinary and well-understood sense, as referring to a class upon whom descent of property was cast

by the statutes of descent. Had he intended the bequest for her, he would not have said "lawful heirs," but "lawful heir." He had not her in his mind, but his numerous kindred who by the statute would inherit his property.

In a recent case in Missouri, the supreme court, in a case where an adopted child claimed under a will which devised property to "the nearest and lawful heirs of mine," draw the distinction very properly between "lawful heirs" and an heir by adoption. Mr. Justice Brace said: "The *status* or relation of an adopted heir is a lawful one, since the law sanctions and provides a method for its creation; but the relation is not the creature of the law, but of the deed of adoption. A child by adoption is, in a limited sense, made an heir, not by the law, but by the contract evidenced by deed. 'Adopted heir,' or 'heir by adoption,' would be appropriately descriptive of such relation. Contradistinguished from such an heir are those upon whom the law casts descent, who are constituted heirs by law. These are appropriately described as heirs at law or heirs by the law. . . . The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words 'lawful heirs,' and those words ought not to be held, *ex vi termini*, to include an adopted heir": *Reinders v. Koppelman*, 94 Mo. 344.

Entertaining no doubt respecting the intention of the testator to give his property, by the term "lawful heirs," to his brothers and sisters, and the children of any deceased brother or sister by the right of representation (*Eyer v. Beck*, 70 Mich. 179), and that it was not his intention to include in that term the claimant, May Morrison, or May Sessions, as she is called in the order appealed from, we hold that she has no claim upon any share of his estate, and an order must be entered reversing the order of the circuit court, and it must be certified to that court to reverse and set aside the order appealed from so far as it directs or decrees distribution to May Sessions, and to enter an order decreeing distribution to the heirs at law of Amasa Sessions, and certify the same to the probate court.

The appellants will recover their costs of both courts.

WILLS, CONSTRUCTION OF. — The fundamental rule in the construction of wills is, that the intention of the testator be ascertained and carried out: *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54, and note 59; *Daugherty v. Rogers*, 119 Ind. 254.

PARENT AND CHILD — ADOPTION. — The adopted child is entitled by inheritance to the estate of the adopting parent: *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; but the act of adoption must conform strictly to the method prescribed by the statute: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808.

BRUSH v. FISHER.

[70 MICHIGAN, 469.]

ARBITRATION AND AWARD. — AWARD OF ARBITRATORS AS TO THE RENTAL VALUE of property will not be set aside, in the absence of proof of fraud or misconduct in the arbitrators or of gross mistake on their part.

ARBITRATION. — AWARDS ARE FAVORED IN LAW and reluctantly set aside. Every presumption is made in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof.

ARBITRATION. — ERROR OF FACT OR LAW MADE BY ARBITRATORS in their award does not avoid it, unless such error is so gross as to be of itself clear proof of corruption and fraud.

ARBITRATION. — RIGHT TO OBJECT TO SELECTION OF THIRD ARBITRATOR BY LOT is waived by assenting to the selection and proceeding to trial with knowledge of the facts.

ARBITRATORS ARE EXPECTED TO FRAME THEIR DECISION on broad views of justice, which may sometimes deviate from strict rules of law. The utmost good faith in the discharge of their duties will be presumed, and their award will not be disturbed without clear proof of corruption, partiality, or misconduct on their part.

F. A. Baker, for the complainants.

C. I. Walker and C. A. Kent, for the defendants.

LONG, J. On November 23, 1871, Edmund A. Brush, deceased, executed to the defendant Aaron C. Fisher a lease for five years, at two hundred dollars a year, of lots 8 and 9, in block 10, of the Brush subdivision of part of park lots 17 and 18, on the east side of Woodward Avenue, in the city of Detroit. The lots have a frontage on Woodward Avenue of one hundred feet, and are two hundred feet deep, and are on the corner of Woodward Avenue and Erskine Street.

Mr. Fisher, in addition to the payment of the rent, agreed within two years to erect a brick building suitable for a dwelling, at least two stories high, and equal to twenty-five feet front and thirty-six feet deep, on the two lots leased, fifty feet back from the front of the lots, and erect no building within twenty feet of Erskine Street. He further agreed to pay all taxes and assessments levied against the property during said term.

Among other provisions, the lease contained the following: "And it is further covenanted by and between the parties hereto, that, at the expiration of said term of five years, the party of the first part, his executors, administrators, or assigns, shall have the right, in his or their election, to purchase and take of and from the party of the second part, his executors, administrators, or assigns, the buildings and improvements erected by him or them, or being on said premises, at a valuation thereof, not to exceed twenty thousand dollars, to be made by three disinterested persons, to be chosen one by each party, and the third by those referees if they disagree, and upon such purchase, to re-enter upon said premises, and the same to have again as in their former estate and right.

"If the party of the first part, his executors, administrators, or assigns, elect not to make such purchase, then this lease, at the then rental value of the premises, to be determined by a reference in the manner above set forth, and upon the other terms and conditions above set forth, shall stand continued for another term of five years. And in a like manner at every expiration of every succeeding term of five years the same election as above reserved by the party of the first part, his executors, administrators, or assigns, shall be had; and if the buildings and improvements, as above limited, are not purchased and taken, then this lease, at the then rental value, to be determined as above described, and upon the other terms and conditions above set forth, shall stand continued for another term of five years."

Mr. Fisher entered into possession of the lots under this lease, and erected a first-class dwelling-house thereon, with a barn and other improvements, the whole expense of which buildings and improvements was between twenty-three thousand and twenty-four thousand dollars, and which he now values at twenty thousand dollars. These premises Mr. Fisher uses solely for a residence, and claims to have built the same for a family residence and homestead, and not as an investment for capital.

The first term of five years under this lease expired January 1, 1877.

The annual rental was fixed, by the mutual agreement of the parties, for the second term of five years at the same amount as for the first term, viz., two hundred dollars. At the expiration of the second term of five years the annual rent was fixed, by the mutual agreement of the parties, for the

third term, at three hundred dollars per year, and the same was indorsed on the lease.

At the expiration of the third term of five years, the parties were unable to agree on the amount of the annual rental for the fourth term, and the parties submitted to have the same fixed by arbitrators as provided in the lease. The complainants, who are trustees of the estate of Edmund A. Brush, deceased, appointed Edward J. Stimson as one arbitrator, and defendant Fisher appointed Mr. Alanson Sheley the other. The arbitrators not being able to agree on the rental value of the premises, or on the third arbitrator, they finally selected as third arbitrator Mr. Alvah E. Leavitt by lot. After hearing the parties, Mr. Sheley and Mr. Leavitt agreed upon an award fixing the rental of the premises for the fourth term at an annual rental of two hundred dollars. Mr. Stimson did not join in this award, or agree to its terms. The bill is filed in this cause in the circuit court for the county of Wayne, in chancery, to set aside and vacate this award.

On the hearing in the court below, the award was set aside and vacated, and held for naught, with costs against defendant Fisher, who brings the case into this court by appeal from such final decree.

It was said by this court in *Port Huron etc. R'y Co. v. Callan*, 61 Mich. 26, that "there is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under manifest mistake, and perhaps in some defined and undefined cases. But it is evident that there are great objections to any general interference by courts with awards. They are made by a tribunal of the parties' own selection, who are usually, at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that, after resorting to such private tribunals, either party may repudiate their action, and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duty laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed."

It is charged in this case that the arbitrators chosen were

guilty of undue partiality and misconduct, and that their award was properly set aside by the court below; and counsel for complainants bases his argument in support of these charges upon the fact, principally, that the parties to the lease fixed the rent in 1871 at two hundred dollars and in 1882 at three hundred dollars a year, while in 1887 the arbitrators fix the amount of the annual rental at two hundred dollars, the same as fixed by the parties in 1871, though, it is claimed, the property for the last fifteen years has greatly increased in value, and become more desirable for residence property. This increase in value is admitted by defendant Fisher. The assessed value of the lots has increased from eighteen hundred dollars in 1871 to seventeen thousand five hundred dollars in 1887.

It is claimed on the part of defendants, and defendants Sheley and Leavitt, two of the arbitrators, testify, that because of the increased value the taxes had increased, and that the rental should be reduced, instead of increased. It is therefore claimed by complainants,—1. That the lease, the contract between the parties, very clearly contemplates that, if the lots increase in value for residence purposes, the ground-rent is to be increased, and if they decrease in value the ground-rent is to be decreased, and that that is what the contract means; 2. That any award made upon the theory that an increase in the value of the property necessitates and justifies a reduction in the ground-rent is a violation of the contract between the parties, and that these arbitrators, in making such an award, have not acted within the lines of duty laid upon them, and have not carried out the agreement under which they obtained authority to proceed.

Courts, however, favor awards made by tribunals of the parties' own choosing, and are reluctant to set them aside, and every presumption will be made in favor of their fairness, and the burden of proof is upon the party seeking to set them aside, and the proof must be clear and strong: *Morgan v. Mather*, 2 Ves. Jr. 15; *Herrick v. Blair*, 1 Johns. Ch. 101; *Davy v. Faw*, 7 Cranch, 171; *Van Cortlandt v. Underhill*, 17 Johns. 411; *Morse on Arbitration and Award*, 531, 544.

It appears, from the assessment rolls put in evidence in the case in the court below, and from the testimony taken in the case, that up to 1875 assessments were made upon the basis of thirty per cent of the cash value of the property. In 1876 the system was changed, and a cash valuation substituted.

The assessment at thirty per cent, in 1872, of \$2,700, would make the cash valuation at that time of \$9,000. In 1876, the last year of the first term, the assessment was \$13,325. In 1881, the last year of the second term, it was assessed at \$13,500. In 1886, the last year of the third term, it was assessed at \$14,350. In 1887 the assessment was \$17,500. Before the arbitrators it was conceded that the property was worth \$25,000.

It appears, also, that while the property was rapidly increasing in value,—over one hundred per cent in sixteen years,—the taxes were also rapidly increasing in amount from year to year. The average of general taxes for the first term of five years was \$213.10. The average tax for the next term of five years was \$282.54 per annum. The average tax for the third term of five years was \$386.96, making the tax for the third term almost double the first term. The tax for 1887 is still greater, being \$451.39.

In addition to these regular taxes, there were special taxes and assessments paid by the lessee; at the time of making the lease, \$500 for paving tax; in 1874, also a paving tax of \$436.84; in 1882 another paving tax of \$195. Besides these, there were other taxes for sewers, sidewalks, etc., the amount of which is not given. It also appeared that preparations were being made to pave Erskine Street, during 1887, at an expense of from five hundred to six hundred dollars. These improvements, and the increase of the property, inure to the benefit of the lessor, while it has increased the rental by taxation.

The lease is a somewhat peculiar one. It is a perpetual lease, so far as the lessee is concerned. He has no right to avoid it or give it up; but it is not perpetual upon the part of the lessor. He is at liberty, at the expiration of any term of five years, to set aside the lease, and take the property into possession, if he should see fit to do so, upon the terms therein named, viz., of paying the then value of the improvements under the limitations of the lease. The lessee was bound to erect a building, as hereinbefore stated, and was not only to pay the rental, but to "bear, pay, and discharge all taxes and assessments whatsoever, laid, assessed, or becoming payable during said term on said premises."

He could not let, transfer, or assign said premises, or any part thereof, or any interest therein, without the written consent of the lessor; and if the lessor elect, at the expiration of

any five years' term, to take back said property, he is to purchase the buildings and improvements erected and being on said premises at a valuation thereof, not to exceed twenty thousand dollars, to be fixed by disinterested persons. If the lessor does not elect to make such purchase, the rental value for another term of five years is to be determined by a reference if the parties do not agree, and so on at the end of every five years.

There is an express condition in the lease that if the rent, taxes, or assessment shall not be paid when the same is due and payable, or if the lessee should not observe, keep, and perform all the covenants and conditions of the lease, everything in the lease to be performed by the lessor shall cease, determine, and be utterly void, anything therein to the contrary notwithstanding; and the lessee covenants in such case, at the determination of said lease, under these provisions, that he will peaceably and quietly surrender and yield up said premises; and the lessee agrees to waive any and all notice or notices which may be required by law to be given to him by the lessor, in the event of any default being made on his part of the demand of possession and of said premises.

Undoubtedly, the arbitrators, in fixing the rental value of the premises, took into consideration many, if not all, the considerations herein mentioned, and upon the whole case thus submitted fixed the rental at two hundred dollars per annum, and we are not prepared to say that the value fixed by them, under the circumstances, is any evidence of undue partiality, and we see in it no evidence of any misconduct on the part of the arbitrators; but it would seem that these stringent provisions in the lease would have some effect upon the rental value.

There is no charge in the bill that the arbitrators committed any error of fact or law in fixing the rental value of the premises, or that the sum fixed was an unreasonably low one; and had there been, it would have been no ground for setting aside the award that the arbitrators had committed an error of fact or law, unless the error was so gross as of itself to furnish clear proof of corruption and fraud: *Morse on Arbitration and Award*, 293, 298; *Boston Water Power Co. v. Gray*, 6 Met. 131; *Burchell v. Marsh*, 17 How. 344; *Anderson v. Taylor*, 41 Ga. 10; *Lester v. Callaway*, 73 Id. 731; *Kirten v. Spears*, 44 Ark. 166; *York etc. R. R. Co. v. Myers*, 18 How. 246; *Winship v. Jewett*,

1 Barb. Ch. 173; *Perkins v. Giles*, 53 Barb. 342; *Van Cortlandt v. Underhill*, 17 Johns. 405.

It appears that the third arbitrator, when the two chosen by the parties were unable to agree, was chosen by lot, and it is claimed by the complainants that this was not a competent way of making choice; that the lease contemplates that the third arbitrator will be chosen by an exercise of judgment by the first two arbitrators,—that is, by a comparison of views, and an adjustment of differences. And counsel cites in support of this proposition *In re Cassell*, 9 Barn. & C. 624; *Ford v. Jones*, 3 Barn. & Adol. 248; *In re Greenwood*, 9 Ad. & E. 699. It appears, however, that Mr. Thompson, one of the trustees of the Brush estate, assented to the selection, and that the parties, with full knowledge of the manner in which the choice was made, submitted their case, and made no objection to the arbitrator until the award was made by them. If the parties had a right to object to this mode of making a choice, they must be held to have waived it by their conduct in proceeding to a hearing, knowing the fact: 2 Parsons on Contracts, 707; Morse on Arbitration and Award, 242; *Neale v. Ledger*, 16 East, 51; *In re Tunno*, 5 Barn. & Adol. 494.

It is also contended by complainants that Mr. Sheley had formed an opinion as to the rental value of the premises before the time of his being appointed an arbitrator, and that such preconceived opinion is a sufficient reason for avoiding this award, inasmuch as the complainants were not aware of such bias at the time of submitting the case. It appeared, upon Mr. Sheley's examination in the present case, that he told Fisher, when he consented with Mr. Brush to put the rent up to three hundred dollars, that he did not understand his own interest. Mr. Sheley was further interrogated by complainant's counsel upon that subject as follows:—

“Q. Did you think that he understood his own interest when he entered into the lease? A. No; I did not think he did then.

“Q. And that controlled you in making this adjustment? A. I think he made a mistake when he entered into the lease.

“Q. And now, Mr. Sheley, that view of it influenced you in arriving at what he ought to pay? A. I do not know that it does.”

It appears that this opinion was expressed by Mr. Sheley five years before the time of his acting as arbitrator, and at

the time when the third term of five years commenced on the lease.

There is no showing upon this record that Mr. Sheley had such an opinion, at the time of his acting as arbitrator, that in any manner influenced his judgment; and it is expected of arbitrators that they will frame their decision of matters submitted to them on broad views of justice, which may sometimes deviate from the strict rules of law; and there is nothing in the whole record indicating that Mr. Sheley or Mr. Leavitt did not act in the utmost good faith in the discharge of the duty assumed by them as such arbitrators.

"It is a well-settled rule in equity," says Senator Allen in *Van Courtlandt v. Underhill*, 17 Johns. 420, "that an award of arbitrators of the parties' own choosing, unless outrageously excessive on the face of it, and such as would induce every honest man at first blush to cry out against it, cannot be set aside, unless there be corruption, partiality, misconduct, or the use of an excess of power in the arbitrators, or fraud upon the opposite party."

We have carefully read this record, and are unable to find any testimony showing, or tending to show, that these arbitrators were guilty of corruption, partiality, misconduct, or any other act which would warrant a court in setting aside their award.

The office of arbitrator is one voluntarily assumed, and is many times a thankless task, and parties often feel aggrieved at their findings. Charges of corruption, fraud, partiality, and misconduct are easily made. The burden of proving these charges, however, rests upon the party making them. Every presumption will be made in favor of fairness; and courts of equity, even, will not set aside an award for reasons based upon such charges, unless the proof is made clear and strong. We find no proof in this case even tending to establish these charges.

The decree of the court below must be reversed and set aside, and a decree entered in this court dismissing complainants' bill, with costs of both courts.

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ARBITRATION AND AWARD. — For what causes may an award be impeached: Note to *Jocelyn v. Donnel*, 14 Am. Dec. 754, 755; note to *Morville v. American Tract Soc.*, 25 Am. Rep. 46, 47.

AGREEMENTS TO SUBMIT TO ARBITRATION: Extended note to *Commercial Union Ins. Co. v. Hocking*, 2 Am. St. Rep. 566-571.

ARBITRATION AND AWARD — VALIDITY OF AWARD. — *Statutory Requirements.* — It is necessary for a valid statutory submission to arbitration that the agreement shall name each arbitrator: *Holdridge v. Stowell*, 39 Minn. 360; and when an award is not made according to statutory provisions, its legality and effect must be determined by the rules relating to awards at common law: *Thornton v. McCormick*, 75 Iowa, 285. Under the Massachusetts statutes, an award by two only of three arbitrators, when the third is absent, is invalid, unless such third arbitrator refused, after due notice, to attend their meetings, even though the agreement for submission says that the award of the majority shall govern and be final: *Doherty v. Doherty*, 148 Mass. 367; but in Kentucky it has been held that an award under the same circumstances was valid; for "an act directed by law to be done by three or more persons may be done by the majority of them concurring, unless by express words or by implication a contrary intention appears": *Hewitt v. Craig*, 86 Ky. 23.

Setting Aside the Award. — The power of setting aside an award or entering judgment thereon is very analogous to the power exercised by the court in granting or refusing a new trial after a verdict: *Buckwalter v. Russell*, 119 Pa. St. 495. The award of an arbitrator cannot be set aside for mere errors of judgment as to the law or the facts; for an award is unassailable unless the arbitrator was guilty of fraud or misconduct: *Masury v. Whiten*, 111 N. Y. 679; *Goddard v. King*, 40 Minn. 164; or mistake: *Buckwalter v. Russell*, 119 Pa. St. 495; and so misconduct on the part of arbitrators which works an injury to one of the parties will be a ground for setting aside an award: *Shipman v. Fletcher*, 82 Va. 601. An award has even been set aside where the arbitrators, after being appointed as such, while engaged in their duties as arbitrators, partook of the hospitalities of one of the parties: *Robinson v. Shanks*, 118 Ind. 125. The fact that defendant in an action upon an award was not permitted to give any testimony before the arbitrators, although he so desired, is a good defense: *Graham v. Woodall*, 86 Ala. 313; for each party is entitled not only to be present at the arbitration proceedings, but each must have his case submitted to all the arbitrators, and if evidence is heard in the absence of one arbitrator without the assent of a party, an award rendered against him will be set aside: *Vessel etc. Co. v. Taylor*, 126 Ill. 250. Consulting with a person who is not an arbitrator is not such misconduct as will necessitate the setting aside of an award: *Simons v. Mills*, 80 Cal. 118; nor will an award be set aside for mere alleged excessiveness, in the absence of fraud on the part of the arbitrators: *Baltimore etc. R. R. Co. v. Canton Co.*, 70 Md. 405; nor will an award be set aside merely because the arbitrators fail to state the facts found and the conclusions of law separately: *Westover v. Armstrong*, 24 Neb. 391.

Conclusiveness of an Award. — A common-law award is conclusive between the parties thereto as to all matters submitted to arbitration, unless there appears some material mistake upon the face of the award, or there exists some equitable ground for setting the award aside: *Thornton v. McCormick*, 75 Iowa, 285; and it is presumed that all matters and claims presented by each of the parties as to their mutual differences were considered by the arbitrators in arriving at their award: *Rice v. Hassenpflug*, 45 Ohio St. 377.

Impeachment of an Award. — Where the arbitrators recite in their award that they have disposed of the matters submitted to them for arbitration as was proper under the provisions of the agreement for submission, the parol testimony of one or more or all of the arbitrators cannot be admitted to impeach their award and its recitals: *Schmidt v. Glade*, 126 Ill. 485.

UNION MUTUAL ASSOCIATION v. MONTGOMERY.

[70 MICHIGAN, 587.]

CORPORATIONS — MUTUAL BENEFIT ASSOCIATIONS. — BY-LAWS, ARTICLES OF ASSOCIATION, and certificates of membership of mutual benefit associations determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATION — REASONABLE BY-LAW. — A by-law of a mutual benefit association providing that "any member may change the beneficiary designated upon application in writing, stating to whom he desires such benefits paid, the surrender of his old certificate, and the payment of a fee of one dollar," is a reasonable regulation of the right of the member to exercise the power of appointment of the beneficiary whenever and so often as he pleases.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATION. — DESIGNATED BENEFICIARY of a member of a mutual benefit association has no interest nor vested right in the fund or bounty of his donor until the death of the latter. Therefore the consent of the former to a change made in the beneficiary is not required.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATIONS. — Designated beneficiary of a member of a mutual benefit association has, upon the death of such member, an interest fixed and certain in the bounty of his donor, and he may compel the corporation to levy an assessment for its payment.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATIONS — CONSTRUCTION OF DISPOSING CLAUSE. — Where a member of a mutual benefit association designates that his benefits shall be paid to his son and daughter, "if living," and "if not living," to his heirs, or if either be dead, then to the survivor, the words "if living" and "if not living" refer to living at the time of the donor's death, and the provision as to survivorship applies to the beneficiary surviving him.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATIONS — CONSTRUCTION OF DISPOSITION. — Disposition of benefits created by a mutual benefit association should be construed the same as a bequest by will.

CORPORATIONS — MUTUAL BENEFIT ASSOCIATIONS. — DISPOSITION OF BENEFITS made by a member of a mutual benefit association operates and vests in the beneficiary from the death of the member, unless an intention to the contrary appears.

Floyd R. Mechem, for the complainant.

J. C. Hopkins, and Boyle, Adams, and McKeighan, for the appellant Ellis.

Briggs and Clark, for the defendant Montgomery.

CHAMPLIN, J. A bill of interpleader was filed by the above-named complainant against defendants, who each lays claim to a fund which the association acknowledges itself liable for, and willing to pay to the one legally entitled. The following facts are admitted :—

"1. That said Union Mutual Association is a co-operative

and mutual benefit society, organized and doing business under and in pursuance of an act of the state of Michigan entitled 'An act to provide for the incorporation of co-operative and mutual benefit associations,' being chapter 118 of Howell's Annotated Statutes; that the object of said association is to secure to the family or heirs of any member, upon his death, a certain sum of money, to be paid out of the proceeds of an assessment upon the members; and that all persons whose lives are insured are members of the association.

"2. That every person desirous of becoming a member makes to the association a written application for membership, wherein, among other matters, he sets forth the amount of insurance desired, and the name of the beneficiary; that, upon the admission of a member, the association issues to him a certificate of membership, in the form hereto annexed, constituting him a member, and containing a promise to pay, upon the death of such member, to such member of his family or heirs as were named in said application, a sum of money in accordance with the articles of association, by-laws, and other rules and conditions prescribed by the association.

"3. That upon the twentieth day of January, A. D. 1883, one Edward C. Franklin, then a resident of Ann Arbor, in this state, made to the association a written application for membership, which is hereto annexed and made a part hereof, marked 'Exhibit A'; that in and by said application he requested insurance to the amount of fifteen hundred dollars, to be made payable, in case of death, to Cecelia M. Franklin, his wife, and Charlotte A. Franklin, his daughter, equally, with the further direction that, in case of the death of either, the full amount should go to the survivor.

"4. That upon the twenty-second day of January, A. D. 1883, the association admitted said Edward C. Franklin to membership, as requested in said application, and upon that day issued to him a certificate of membership, which is hereto annexed and made a part hereof, marked 'Exhibit B,' wherein said association constituted him a member, and promised to pay to his wife and daughter, Cecelia M. and Charlotte A. Franklin,—in case of death of either, full amount to go to the other,—the sum of fifteen hundred dollars, upon certain conditions therein named, which certificate was duly delivered to said Edward C. Franklin.

"5. That afterwards, on December 16, 1884, said Edward C. Franklin, who had then removed to St. Louis, Missouri,

wrote to the secretary of the association the letter hereto annexed and made a part hereof, marked 'Exhibit C,' which letter was replied to by one of the clerks in the office of the association; that a few days later said Edward C. Franklin returned said certificate, marked 'Exhibit B,' to the association by mail from St. Louis, with the marginal directions as to change of beneficiaries, signed by him, as appears upon said certificate, and surrendered the same to said association, in whose possession it has since been.

"6. That upon December 23, 1884, a new certificate was issued and delivered to him by mailing the same to him at St. Louis, which new certificate is hereto annexed, made a part hereof, and marked 'Exhibit D,' wherein the names of the beneficiaries were changed, as requested in said letter, to his son, N. Lyon Franklin, and daughter, Charlotte A. Franklin, with the same provision, that, 'in case of death of either, full amount to go to survivor'; which new certificate was of the same number as the one surrendered, and was intended to bear the same date, but, by mistake of the clerk who filled it up, it was dated one year later than the first one. At the same time, said clerk erased the words, 'Cecelia M. Franklin, his wife,' in the said application, and inserted the words, 'N. Lyon Franklin, son.'

"7. That while said reissued certificate was in force, and on or about December 10, 1885, said Edwin C. Franklin died, leaving surviving him his said wife, son, and daughter; that satisfactory proofs of such death were duly furnished to said association on or about January 20, 1886, by said N. Lyon Franklin and Charlotte A. Franklin, who was then married and become Charlotte A. Montgomery, and each of them claimed payment of one half of the amount named in said certificate, which, by the terms thereof, would become due and payable at the expiration of ninety days after the receipt of said proofs, to wit, on April 20, 1886; that said Cecelia M. Franklin did not join in said proofs, nor make any claim therein as beneficiary.

"8. That before the time for the payment of said amount arrived, and on or about February 1, 1886, said N. Lyon Franklin died, leaving a last will and testament, which disposed of his entire estate, and was duly admitted to probate at the residence of said deceased, St. Louis, Missouri, and the execution thereof was granted to the above-named Samuel Ellis, the executor therein named.

"9. That on or about May 5, 1886, said association paid one half of said sum, to wit, \$750, to said Charlotte A. Montgomery, and on or about August 14, 1886, paid the remaining \$750, under an order of the circuit court for the county of Calhoun, in chancery, to the register of said court.

"10. That the application was made by said Edward C. Franklin in person, and upon his own motion, neither his wife nor any of the beneficiaries having any part therein, but after having talked the matter over with said Cecelia M. Franklin; that he paid the advance payment required; that all assessment and other notices were sent to him, and that he paid all of the assessments and dues that were paid; that assessment notices have been issued, and assessments made and paid, only upon one certificate as No. 3,463, and only for the sum of fifteen hundred dollars; and that at least three assessments, at intervals of three months apart, were made between the time of issuing the second certificate and the date of the death of said Edward C. Franklin.

"11. That the association has no capital stock, nor any fund, income, or means from which to pay death losses, except such as is derived from assessments made upon all the members having certificates in force at the death of any member, each member paying assessments at a fixed rate per one thousand dollars of insurance, said rate being determined by his age at admission, and that the failure of the member to pay assessments or dues within forty days terminates the membership and avoids the certificate.

"12. That the following provisions are contained in the articles of association and by-laws in relation to the designation and change of beneficiaries, and are the only provisions upon the subject:—

“ARTICLES OF ASSOCIATION.

“Sec. 5. The object of the incorporation is to secure, at its maturity, to the beneficiary named in the certificate of any member then in good standing the payment of the sum specified in such certificate.’

“BY-LAWS.

“Sec. 23. When an applicant is accepted, he shall receive a certificate of membership, signed by the president and secretary, under the seal of the association, which certificate shall state the amount to be paid to the beneficiary in case of death, and shall be in accordance with the conditions of the applica-

tion of the member to whom the certificate is issued, making the payment of the benefit sum payable as directed in the application; subject, however, to all the provisions of the articles of association and by-laws, and waiving all claims for payment upon the association or its individual members beyond such as is realized by one mortality assessment of the members of the association as prescribed by the table of mortality assessments. Any member may change the beneficiary designated as aforesaid upon application, in writing, to the secretary, stating to whom he desires such benefits paid, the surrender of his old certificate, and the payment of a fee of one dollar; whereupon the secretary shall change upon the record the name of the beneficiary, and issue a new certificate accordingly, of the same number as the old one.'

"This section of the articles and this by-law were in force when the application was taken, and continued in force until after the death of said Edward C. Franklin.

"13. That said Charlotte A. Montgomery had no knowledge of the first certificate until she was told of it by her father, after its issue; that her father told her he intended to change one of the beneficiaries from said Cecelia M. Franklin to said N. Lyon Franklin, but she did not know that the change had been made until after her father's death, which was the first knowledge she had of the second certificate.

"14. That said Cecelia M. Franklin had no knowledge of the issue of the first certificate until after it was issued, and had no knowledge of and did not consent to its surrender or change.

"15. That said Edward C. Franklin took out a policy in another company for one thousand dollars, for the benefit of said Cecelia M. Franklin."

It is not necessary to set out or refer to the application, exhibit A, nor the original certificate, exhibit B, as the certificate is the same in all respects as the certificate subsequently issued, except as to date, and the substitution of the name of N. Lyon Franklin in place of Cecelia M. Franklin as a beneficiary. Exhibit C reads as follows:—

"St. Louis, December 16, 1884.

"CHARLES E. FOOTE, Secretary, Battle Creek, Mich.

"Dear Sir,—I wish to change the beneficiary in my life policy No. 1,500 of the Union Mutual Association of the city of Battle Creek, so as to read, 'to his son and daughter, N. Lyon and Charlotte A. Franklin, equally. In case of the

death of either, full amount to go to the survivor.' Will you oblige me in this, as I shall make other arrangements for the party dropped in another company, if the above change can be made?

"Very respectfully,

"E. C. FRANKLIN."

The new certificate issued reads as follows:—

"No. 3,463.

\$1,500.

Age, 61.

"THE UNION MUTUAL ASSOCIATION OF BATTLE CREEK, MICHIGAN,—

"In consideration of the warranties to it made in the application for this certificate, and the sum of eight dollars and fifty cents to it paid, and the sum of two dollars to be paid on or before the first day of July next, and in each year thereafter during the continuation of this contract, and the further sum of ten dollars and eighty-three cents to be paid at each assessment, to be made only upon the death of a member, does hereby constitute Edward C. Franklin, of Ann Arbor, county of Washtenaw, state of Michigan, a member of the association; and ninety days after satisfactory proof of the death of said member, and upon the surrender of this certificate, with discharges thereof, upon condition that all payments have been made as required under this certificate, up to the time of death, in accordance with the terms and agreements made in the application for this certificate, and upon the further conditions printed upon the back hereof (which application and conditions are hereby referred to and accepted by said member as a part of this contract), the said Union Mutual Association agrees to pay to his son and daughter, N. Lyon and Charlotte A. Franklin, equally,—in case of death of either, full amount to go to the survivor,—one thousand five hundred dollars, if living; if not living, to the heirs of said member.

"In witness whereof, the said Union Mutual Association has caused this certificate to be signed by its president, and sealed and attested by its secretary, at its office, in the city of Battle Creek, state of Michigan, this twenty-second day of January, 1884.

"CHAS. AUSTIN, President.

[SEAL.]

"CHAS. E. FOOTE, Secretary."

The court below entered a decree adjudging,—1. That complainant be paid its costs of suit to be taxed, out of the fund deposited in court; 2. That Charlotte A. Montgomery is entitled to the residue of said fund, and directing the register of the court to pay the same over to her; 3. That she recover her

costs to be taxed against her co-defendants, Samuel Ellis, as executor of the last will and testament of N. Lyon Franklin, deceased, and Cecelia M. Franklin.

The only question in the case is, To whom does the fund which has been paid into court belong?

The case is to be determined by the articles of association, by-laws, and certificate of membership. These laws and regulations determine the rights of the members and the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided: *Arthur v. Odd Fellows' etc. Ass'n*, 29 Ohio St. 557, 560; *May on Insurance*, sec. 552; *Bliss on Insurance*, sec. 426; *Independent Order of Red Men v. Schmidt*, 57 Md. 106.

Section 23 of the by-laws gives to any member the privilege of changing the beneficiary upon complying with certain requirements. This by-law is a reasonable regulation of the right of the member to exercise the power of appointment of the beneficiary whenever and so often as he pleases. Circumstances may intervene which may make it desirable for the member to make a change in the beneficiary, and, as such designated beneficiary has no vested right in the fund or bounty of the donor, his consent to the change is not required, nor has he any interest that can be either protected or asserted in a court of law. Cecelia M. Franklin has no legal or equitable claim upon the fund. When a valid appointment has been made, a time will arrive when the beneficiary has a vested right to the fund. The only question under the certificate of membership in the present case is, whether such right became vested so as to pass to the beneficiaries equally at the time of the death of Edward C. Franklin.

The scheme of the corporation is to raise a fund which shall pass to designated beneficiaries at the death of the member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary. He may compel the corporation to levy the assessment, if it refuses, after the time limited for payment. The provision relating to survivorship applies to the one of the two who shall survive the donor. If neither survive him, the fund goes to the heirs of the member. The time of payment provided for, namely, ninety days after the death of the member, has no reference to who shall take as survivor. The time of payment is defined simply to enable the corporation to raise the fund by assessment upon the members. If the son, N. Lyon

Franklin, had died before his father, Edward C., the whole sum would have been payable to the daughter, Charlotte A., and if she had also died before her father, the fund would have been payable to his heirs. The words "if living" and "if not living" refer to living at the time of Edward C. Franklin's death.

The same rules of construction should be applied to dispositions of property created by these mutual benefit associations as are applied to bequests by wills. They partake of the nature of testamentary dispositions of property. It is well-established law in this state that the policy of our statutes favors vested in preference to contingent estates, and that, unless an intention appears to the contrary, the will shall operate from the death of the testator, and estates vest at that time: *Rood v. Hovey*, 50 Mich. 395; *Porter v. Porter*, 50 Id. 456; *Toms v. Williams*, 41 Id. 552; *Eberts v. Eberts*, 42 Id. 404.

In this case I think it clear that the gift to the beneficiaries became operative at the death of the donor, and consequently this share of the fund vested in N. Lyon Franklin at that time, and could be disposed of by his last will.

It follows that the decree will be affirmed as to the first clause above noted, and reversed as to the residue. And a decree will be entered here, declaring that the executor of N. Lyon Franklin, deceased, is entitled to the residue of said fund, and directing the register of the circuit court to pay the same over to him, and he will recover his costs of both courts against said Charlotte A. Montgomery and Cecelia M. Franklin to be taxed.

MUTUAL BENEFIT ASSOCIATIONS. — Mutual benefit societies are subject to the rules of law governing life insurance companies, except so far as those rules are modified by the organization, objects, and policy of such societies: *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620; compare *Miser v. Michigan Mut. B. Ass'n*, 63 Mich. 338; *Titsworth v. Titsworth*, 40 Kan. 571. The rights of a member of a mutual benefit society are governed by the charter of the society: *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571.

The by-laws of a mutual benefit society must be given a reasonable construction: *McCorkle v. Texas Ben. Ass'n*, 71 Tex. 149.

Where the policy does not name a beneficiary, but states it shall be paid subject to the provisions in the insured's will, the executor may sue for the insurance money, although his testator named a particular person in his will to whom he desired the money paid: *Winterhalter v. Workmen's Guarantee F. Ass'n*, 75 Cal. 245. Unless a policy designates a person to whom the money shall be paid in case of the death of the beneficiary before the insured, such appointment is revoked by his death: *Given v. Wisconsin O. F. Mut. L. Ins. Co.*, 71 Wis. 547. The beneficiary named in the certificate of member-

ship of a mutual benefit society acquires no vested right to the benefit to accrue at the member's death until such death actually occurs, and the member during life may exercise the power of appointment without any other restrictions save those imposed by the rules of the society: *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 621; but compare *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. L. 106; *Milner v. Bowman*, 119 Ind. 448.

A member may change the beneficiary in his certificate at pleasure during his life, unless expressly forbidden by the rules of the mutual benefit society: *Tilsworth v. Tilsworth*, 40 Kan. 571. Where no mode is prescribed by the rules of the society for changing the beneficiary, an assignment of the certificate, with directions to pay to the assignee, will constitute a valid change: *Milner v. Bowman*, 119 Ind. 448. Change of the beneficiary in a certificate of membership in a mutual benefit society may be made from the member's wife to his mother: *Marsh v. Supreme Council A. L. of H.*, 149 Mass. 512; or from a deceased wife to a second wife: *Millard v. Legion of Honor*, 81 Cal. 340. But whenever the rules and regulations of the society provide a manner in which a beneficiary may be changed, such rules must be followed, and any change made in any other way will not be sufficient: *Wendt v. Iowa L. of H.*, 72 Iowa, 682.

KOOPMAN v. BLODGETT.

[70 MICHIGAN, 610.]

WATERS, USE OF — FLOATAGE — RIGHTS OF MILL-OWNER. — The floatage capacity of a small stream cannot be added to by means of dams, and other expedients and artificial means, so as to deprive the owner of a mill-site of the use of it, and he may enjoin the wrong-doer from retaining water to such an extent as to prevent the mill from getting constantly the natural volume of the stream, and from letting out floods which will injure his dam.

WATERS — RIGHT OF FLOATAGE. — While the public right of floatage exists in streams capable of furnishing valuable facilities for moving logs cut in the vicinity, still the public have no other rights than those furnished by the natural water-way. The riparian owners have a right to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means. No easement beyond the natural one can be obtained without authority, and no further public facility can be exacted without some dedication or condemnation.

WATERS. — RIGHT OF FLOATAGE in public navigable streams is general, but the rule which makes private streams subservient to floatage is based on their natural surroundings, and rests on convenience, if not on necessity. They cannot be treated as public highways for floatage from all quarters, nor subjected to burdens from distant localities.

WATERS — RIGHTS OF MILL-OWNER. — A party owning a suitable place for a mill-site cannot be deprived of it simply because some one else has wrongfully interfered with the stream above him. Without either such a lapse of time as will bar a suit or indicate acquiescence, or some act of estoppel, his rights of property are not barred.

WATERS — MILL-OWNER'S WAIVER OF OBJECTION TO RIGHT OF FLOATAGE. — While straightening the channel of a stream above his mill by the owner, at the expense of a log-runner, indicates an admission that logs

might be run, and that the channel was thereby made safer for his own premises as well as more convenient during log-driving, still this admission in no way authorizes the use of the river so as to crowd it beyond its fair capacity, or to take such action as involves danger to the mill.

INJUNCTION. — **OWNER OF REALTY IS ENTITLED TO EQUITABLE AID TO PREVENT PERMANENT AND CONTINUALLY RECURRING INJURIES** to the enjoyment of his property. He is entitled to such relief as will protect him in his interests, and wrong-doers cannot rely upon their own wrongs to change or lessen his means of redress.

Moore and Wilson, and M. Brown, for the complainant.

Edwin F. Uhl, for the defendants.

CAMPBELL, J. Complainant is owner of a mill and water-power on Clam River, in Missaukee County, at Falmouth, about twelve miles from the place where that river discharges into the Muskegon River. Defendants Blodgett and defendant Pion, who is their foreman, are complained of for maintaining and managing several dams farther up the stream, used for no other purpose than to facilitate the moving of logs in the stream by storing up and letting out water to float the logs and to aid in driving them. The effect on complainant's mill is claimed to be an interference with and in some cases a stoppage of the water supply, and a danger, which has proved an actual one, that a sudden escape of the water from the dams may destroy complainant's dam and mill entirely.

The testimony shows very clearly that interruption of the water supply is and has been very serious, to the extent of greatly damaging the mill and business, and that the whole dam and mill property were on one occasion destroyed by the rush of water. It also appears that the difficulty is not one occurring temporarily and at rare intervals, but frequently and for considerable periods at different times in the year. There is very little pretense that defendants have not made themselves responsible for damages by the manner in which their work has been carried on, although they dispute the extent and character of the wrong done. But their defense rests chiefly on their right to do so much of what they have done as to leave the case in the predicament of a contest between parties who have similar and common rights, which must accommodate each other, and any occasional abuse of which should be compensated in damages, and not restrained by measures in equity.

These rights claimed by defendants are alleged by them to spring from the character of Clam River as a floatable stream,

in which they insist on a right to run logs by means of the contrivances resorted to, so that complainant is, as they insist, required to put up with the incidental inconveniences. The case presents a rather remarkable instance of the way in which a small stream has been by various additions and appliances made to perform the work of a large one, and made subservient to a single set of interests, at the expense of all others.

Clam River has its head in Clam Lake, which is by the bendings of the stream apparently between thirty and forty miles above Falmouth. By some work done by defendants, or some of them, it has been enlarged in its volume of water to some extent by tapping that lake so as to draw down its level. Originally, the testimony shows that the upper waters of Clam River were not available in their natural condition for floatage. Some of the witnesses describe the water as running for a distance underground, and then emerging. The explanation given by defendants seems to indicate that, by what may have been originally a gathering of rubbish, a surface was finally made, which was solid, and bore trees upon it, thus forming a soil higher than the stream, which worked its way, though probably not in any defined course, under it. There were also more or less shoals and obstructions along the stream. Defendants, and perhaps others, cleared out most of the rubbish, and improved the stream so as to make it flow in a continuous channel from its upper waters to its mouth. At various times dams were built across the river for purposes auxiliary to log floatage, of which those which chiefly figure in the record were these: A reservoir dam was built near the head of the river, of considerable height, which was meant to keep a supply of water on hand to use when the stream was low, and retained at times for periods of some months so as to allow no escape, unless, possibly, when the dam was more than full, so as to run over, which was not often. Not far from half a dozen miles above Falmouth was a high dam, which threw back the water over a large region of rather low land, and made a very large pond or accumulation. This was also very generally stored up for emergencies in the running of logs, but used for floods and similar purposes as often as needed. Some smaller dams seem to have been used less for storage than for floating or flooding, both for getting the logs afloat so as to start them down, and for supplying water to carry them over the shallows. The high dam last referred to is complained of, both as unreasonably stopping the flow of water to the mill, and as

creating danger by its floods to the dam and mill of complainant.

There is also above Falmouth a small feeder, known as Mosquito Creek, which naturally is an insignificant stream, but into which water was drawn illegally from a neighboring lake, known as Muskrat Lake, so as to enlarge the volume of Clam River from that source.

Defendants appear to have practical control over the log-driving on Clam River above Falmouth, as well as to a large extent below, and complainant claims that without the appliances which defendants use the log-driving business could not be carried on to any large extent, while with them the quantity is very great. It becomes important to know what is the character of this stream as a natural floatway for logs.

Upon this there is some dispute, but not very much. The witnesses who testify concerning the capacity of the stream in its natural condition differ somewhat as to what is its natural condition. The only part of the river which it becomes important to consider in this case is the part of it above Falmouth. Much of the testimony as to floatage capacity before the upper dams were built refers to the lower part of the stream. The utmost that can be said of the upper stream is, that for a short time during high water there was some capacity for taking down logs. But the testimony can hardly be said to leave any doubt that, without the aid afforded by dams and the other expedients used, the floatage would be very limited, and practically of small account. Even the dams, without the addition to the stream of more or less water borrowed from the lakes referred to, would not enable the logs to be floated down in anything like the large amounts now moved. No one can read this record without being convinced that for all practical purposes the river as used is, to a great extent, an artificial water-way, owing most of its value to the improvements. It would be entirely proper to consider the mere removal of rubbish and cleaning out the stream of what has been allowed to encumber it as no change in its character. But there is no rule of law which will allow those who rely on mere floatage rights to add to the burdens laid on riparian proprietors by such an easement. In holding that a public right of floatage exists in streams capable of furnishing valuable facilities for moving logs cut in the vicinity, it has never been the understanding that the public had any other rights than were furnished by the natural water-way. The

riparian owners have a right to the enjoyment of the natural flow of the stream, with no burden or hindrance imposed by artificial means. No easement beyond the natural one can be obtained without authority, and no further public facility can be exacted without some dedication or condemnation. No law exists in this state for the condemnation of property for mere purposes of floatage; and as the experience of many years has shown that log-driving is usually conducted by private persons or companies, who for the time control the entire business on the smaller streams, so that single owners of limited amounts can do very little by themselves, the public character of such facilities is not very obvious. It is very clear, from the testimony in the present case, that no one could make much use of the floatage capacity of Clam River except by depending on defendants' dams, which are not only important aids to floatage, but insuperable obstacles to anything done without the co-operation of their owners.

It appears, also, that, in connection with these artificial aids to floatage, this small stream has been made a receptacle and channel for enormous quantities of logs not cut upon or near its banks, or those of streams furnishing access to it, but brought by rail from considerable distances, and forming no part of its natural burdens. In the case of public streams actually navigable, the right of floatage and navigation may be general. But the rule which makes private streams subservient to floatage is one which has been based on their natural surroundings, and rests on convenience, if not necessity. It is not competent to treat them as public highways for floatage from all quarters. One of the greatest abuses practiced in our water-ways is that animadverted on in *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, of crowding them beyond their capacity. It is not competent to subject a small private stream to burdens from distant localities. Any rule which would justify what has been done in the use of Clam River would go very far towards authorizing water to be turned into any convenient ravine, and converting that into a log-stream against the will of the owner.

One of the most important effects of the works on Clam River is, that logs may be and are driven for longer periods and at different seasons than customary in natural streams, and the consequent extension of the interference with riparian rights.

The testimony is clear that complainant's mill cannot be

safely operated while logs are running. There are some witnesses who claim that it might have been so built as to let logs go through the dam at the same time that water passed through the flume to the wheel. But no reliance can be placed on this testimony. It is not only manifestly biased, but based on no experimental knowledge. It is beyond question that, when logs are run in the manner and to the extent shown here, the log-chute as actually existing is no more than adequate, and has not always been effectual to protect the dam from washing.

It is also claimed that complainant recognized, in various ways, the usages of the river in log-floatage, and built his mill at his peril. This is true to some extent, but not to the extent claimed. There is no pretense that he encouraged any of the outlays of defendants, or that they relied on his acquiescence. A person owning a suitable place for a mill-site cannot be deprived of it because some one else has wrongfully interfered with the stream above him. Without either such a lapse of time as will bar suit or indicate acquiescence, or some act of estoppel, rights of property are not to be barred. The only act of any significance is the straightening of the channel just above complainant's mill, which complainant executed at defendants' expense. This indicated what complainant has never disputed, that he did not deny that logs might be run down the river from above, and the channel by this change was made safer for complainant's own premises during log-running, as well as more convenient for log-driving. But this recognition in no way authorized the use of the river in such a way as to crowd it beyond its fair capacity, or to take such action as involved danger to the mill.

In our view, the only question before us of any difficulty is the nature and extent of the remedy. That defendants have given frequent occasion for damage suits is obvious. But it is equally obvious that such a remedy is inadequate. It has always been settled that the owner of realty is entitled to the aid of equity to prevent permanent and continually recurring injuries to the enjoyment of his property. To deprive him of such enjoyment is to deprive him of the property itself, wholly or to the extent of the mischief. Neither can it be allowable for wrong-doers to rely on their own wrong to change or lessen his means of redress. When they do mischief, it is their own fault if they render a stringent remedy necessary, and they, and not the party injured, must take the consequences. If

the remedy is difficult, it is made so by their conduct. But at the same time it is desirable to give complainant no further relief than will protect him in his interests. He is not concerned beyond this, and defendants are not responsible to him further.

This will be accomplished by restraining defendants from retaining water to such an extent as to prevent the mill from getting constantly the natural volume of the stream, and from letting out floods which will injure the complainant's dam. We do not think it necessary or possible to define in advance just how much water should pass. Practically, there can be no great difficulty in obeying this injunction, and we have no doubt the parties, as reasonable men, can agree upon such measures as will make it unnecessary to interfere hereafter.

The decree below must be reversed, with costs of both courts, and a decree be rendered here in accordance with what is suggested.

WATERCOURSES. — The public has a right to use a stream only in its natural capacity to float logs, and when they by artificial dams or otherwise injure the rights of others, they are responsible: *Witheral v. Muskegon B. Co.*, 68 Mich. 48; 13 Am. St. Rep. 325; *Anderson v. Thunder Bay R. B. Co.*, 61 Mich. 216; compare *Wooden v. Wentworth*, 57 Id. 278, where plaintiff brought an action for damages, because the defendant by flooding a navigable stream prevented the plaintiff from getting sufficient water to run his mill. But when the unlawful act of plaintiff in such a case has contributed to his injuries, he has no remedy, being *in pari delicto*: *Davis v. Munro*, 66 Mich. 485.

INJUNCTION. — To unreasonably obstruct a watercourse is a private nuisance, for which an injunction may be asked in equity: *Ulbricht v. Eufaula W. Co.*, 86 Ala. 587; 11 Am. St. Rep. 72; compare *Heilbron v. Fowler etc. Co.*, 75 Cal. 426; 7 Am. St. Rep. 183, and note 189.

WATERCOURSES. — Under the Kentucky statute, a man who erects a mill upon a stream of water acquires a vested right which cannot be lawfully infringed by another, not even the public, without making him proper compensation: *Anderson v. Cincinnati S. R'y Co.*, 86 Ky. 44; 9 Am. St. Rep. 263. Where mill-owners are once allowed to construct mill-dams for the purpose of getting water sufficient to operate their mills, they cannot be required to provide facilities for floating logs, such as existed prior to the building of such mill-dams: *Foster v. Searsport etc. Co.*, 79 Me. 508; and it is sufficient if the mill-owner keeps the watercourse in such a condition that all logs which would float upon the stream in its natural condition may pass down: *Stratton v. Carrier*, 81 Id. 497.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

**NEW ORLEANS AND NORTHEASTERN RAILROAD COM-
PANY v. BOURGEOIS.**

[66 MISSISSIPPI, 2.]

RAILROAD COMPANIES HAVE A RIGHT TO A CLEAR TRACK in the prosecution of their lawful business, and also a right to the exclusive use and enjoyment of their property, subject to the conditions upon which all others own and use property; namely, that they must so use it as, with reasonable care, not to injure the person or property of others.

CONSTITUTIONAL LAW. — RAILROAD COMPANIES ARE NOT LIABLE IN DAMAGES for every injury inflicted by their trains, and a law so declaring, without reference to whether there was negligence on their part or not, is unconstitutional and void.

RAILROAD COMPANIES ARE LIABLE FOR INEVITABLE ACCIDENTS or misfortunes, in the same measure as natural persons.

RAILROADS — DUTY AS TO ANIMALS ON OR NEAR TRACK. — It is not the duty of a railroad company to check the speed of or stop its trains when an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track. If the animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, the company is not liable in damages.

RAILROADS — DUTY AS TO ANIMALS NEAR THE TRACK. — The use of the whistle or stock-alarm is generally sufficient, and all that is required to keep animals out of the way of the train; and unless appearances reasonably indicate danger of their going upon the track, neither the stopping nor an effort to stop the train is required; but when such danger is suggested, it must be heeded, and a failure to do so will constitute negligence.

RAILROADS — PRESUMPTIVE NEGLIGENCE — EVIDENCE TO OVERCOME. — Proof of injury inflicted by the running of the trains of a railroad company is *prima facie* evidence of the negligence of the servants of such company;

but such evidence may be rebutted, and when the circumstances attending the injury are shown by the evidence, the case must be determined by the jury upon the facts, and not upon any presumption of negligence.

Fewell and Brahan, for the appellant.

Ford and Ellis, for the appellee.

ARNOLD, C. J. This action was brought by appellee to recover damages for the killing of three head of cattle by appellant's trains. The cattle were killed at different times and places. The testimony shows, without conflict, that the animals were not on the track until the train came near them, when they got on or attempted to cross the track within a few yards of the engine, running at the rate of from twenty to thirty miles an hour.

It appears, from the testimony for appellee, that at the places where two of these cattle were struck the view along the track for several hundred yards was unobstructed, and that stock on or near the track might have been seen that distance. This is not denied, but the engineer who was on the train testified, and he is not contradicted on this point, that he did not see either of the cattle until they were so near the engine that he could not check or stop the train in time to save them, and that he sounded the whistle or stock-alarm, and did all he could, under the circumstances, to prevent the collision, but was unable to do so.

It is not shown or suggested that the engineer could or should have done anything that was not done, after the cattle got on the track; but the contention is, that he might have seen them near the track, and should have reduced the speed of the train or stopped it before they came upon the track.

We need not consider what degree of care consistent with his other duties was required of the engineer in keeping on the lookout for obstructions on the track; for if it be admitted that he saw the cattle near the track, before they came upon it, the view contended for cannot be sustained. If adopted without qualification, it would go far to destroy the value and defeat the purposes for which railroads are constructed. Rapid movements and regular connections are among the chief advantages of transportation by railroads. These are demanded both by the interests of the public and of railroad companies. Railroad companies, in the prosecution of their lawful business, have a right to a clear track, and to the exclusive use and enjoyment of their property, subject, of course,

to the condition upon which all others own and use property, that they must so use it as not to injure the person or property of others, if it can be avoided by reasonable care.

Railroad companies are not liable in damages for every injury that may be inflicted by their trains. If a law were to declare them so liable, without reference to whether there was negligence or fault on their part or not, it would be unconstitutional and void: *Zeigler v. South etc. R. R. Co.*, 58 Ala. 594. They are responsible for injuries caused by their negligence or want of skill or care; but there is no reason in law or morals for holding them to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which resulted from unavoidable accident: *Id.*

It cannot be said to be the duty of a railroad company to check the speed or stop its passing trains every time an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track; and if an animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of railroad companies than of other persons: *Mobile etc. R. R. Co. v. Caldwell*, 83 Ala. 196.

Ordinarily, the discovery of animals near the road does not require checking the speed or stopping the train. That should occur only when it seems necessary to avoid collision. Something must be confided to the discretion of the engineer or person in charge of the train, and infallibility on his part is not expected or required. The use of the whistle or stock-alarm is generally sufficient to keep stock out of the way of the train. Unless appearances reasonably indicate danger of their going upon the track, neither the stoppage nor an effort to stop the train is required; but when existing conditions suggest such danger, they must be heeded, and failure to do so will constitute negligence: *Yazoo etc. R. R. Co. v. Brumfield*, 64 Miss. 687; *Little Rock etc. R'y Co. v. Trotter*, 37 Ark. 593.

In all actions against railroad companies for damage done to person or property, proof of injury inflicted by the running of the locomotives or cars of such company is *prima facie* evidence of the want of reasonable skill and care on the part of the servants of such company in reference to such injury:

Code, sec. 1059. Such evidence, if there is none other, entitles the plaintiff to verdict; but such evidence is not conclusive. It may be rebutted and overcome, and the railroad company may acquit itself of negligence in the matter, if it can. And when the circumstances attending the injury are shown by the evidence, the case must then be determined by the jury on the facts proved, and not upon any presumption of negligence created by the statute: *Vicksburg etc. R. R. Co v. Phillips*, 64 Miss. 693.

On the facts of record, the verdict should have been for appellant. It was error to refuse the first instruction asked by appellant.

The judgment is reversed, and a new trial awarded.

RAILROAD COMPANIES. — A railroad company has the right to a free and unobstructed use of its track; but must exercise ordinary care so as not unnecessarily to injure the property of others: *Cincinnati etc. R. R. Co. v. Smith*, 22 Ohio St. 227; 10 Am. Rep. 729, and note 732; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457; *Kerchacker v. Cleveland etc. R. R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 246.

RAILROAD COMPANIES — ANIMALS. — Where a mule was seen near a railroad track, which was straight for a long distance, and he crossed the track when the train was too near him to be checked or stopped, the company was not responsible for striking him, though it would be otherwise if he had been upon the track and seen there in time for the train to have been stopped: *Savannah etc. R'y Co. v. Rice*, 23 Fla. 576. When an animal is wrongfully upon the track of a railroad, without any fault of the company, the train employees need not exercise any care with respect to such animal, except from the time it is actually discovered upon the track: *Palmer v. Northern P. R. R. Co.*, 37 Minn. 223; 5 Am. St. Rep. 839, and note; compare *Davidson v. Chicago etc. R'y Co.*, 75 Iowa, 22.

RAILROADS — KILLING ANIMALS. — Proof of the killing is not *prima facie* proof of negligence on the part of a railroad company, where it has been sued for damages for killing animals upon its track: *Savannah etc. R'y Co. v. Geiger*, 21 Fla. 669; 58 Am. Rep. 697, and numerous cases and authorities discussed in note 703-707.

STEWART v. MATHENY.

[66 MISSISSIPPI, 21.]

NOTICE. — PURCHASER OF LAND IS CONCLUSIVELY PRESUMED to know what appears on the face of the deeds under which he claims.

NOTICE — TENANT FOR LIFE — CLAIM FOR IMPROVEMENTS. — Purchaser of land must take notice of his title as being a life estate or a fee, when that title is disclosed by the records. If he purchases a life estate and erects permanent improvements, he cannot charge the remainderman with their value upon the termination of the life estate.

IMPROVEMENTS — REMAINDERMAN — ESTOPPEL. — The fact that a remainderman stood by and permitted improvements to be made by the tenant for life without giving notice of his claim does not estop him from claiming such improvements upon the termination of the life estate.

TAX TITLE. — Tenant for life cannot acquire the title of the remainderman by purchase at a tax sale.

BILL to cancel title and obtain possession of a lot of land originally owned by one Stewart, who conveyed it by deed to trustees for the use of Mary Stewart for life, and at her death to the grantor's living children. Matheny acquired title and possession to the lot under mesne conveyances from the life tenant purporting to convey the fee. He also claimed under a tax title acquired by his immediate vendor; and failing as to title, he claimed compensation for improvements erected on the lot without notice or knowledge of an outstanding title.

Bristow and Walker, for the appellants.

Clifton and Eckford, for the appellee.

CAMPBELL, J. If the rule which denies to a tenant for life of land compensation for improvements he puts on it during the continuance of his estate is subject to exceptions, the facts of this case do not constitute one.

In *Cole v. Johnson*, 53 Miss. 94, the expression "good faith," employed by our statute on the subject of the right of the defendant in ejectment to claim for improvements, was held not to exclude the claim of one who had purchased land at a sale under a decree of a probate court, and paid for it and improved it, believing his title to be perfect.

In *Pass v. McLendon*, 62 Miss. 580, one who had purchased land from a tenant for life, who held under a will of record in the county in which the land lay, in ignorance of the fact that his vendor did not have the fee, and believing that he acquired the fee, was not entitled to pay for improvements made by him during the existence of the life estate.

We adhere to both cases. One might well be excused from

the requirement of forming a correct opinion as to the validity of a sale of land under a decree of the probate court under the view taken of that court by the appellate court, and was not chargeable with bad faith or gross negligence (its equivalent) for believing, until informed of the contrary, that a sale made by decree of the court intrusted with jurisdiction over the subject and parties was regular and conferred title.

But the purchaser of land must be conclusively presumed to know what appears on the face of the title papers under which he claims, and this presumption cannot be rebutted or explained away. He must take notice of his title as being to a life estate or a fee, where that title is plainly disclosed by the records accessible to him, and not to examine which, ordinarily, would be gross negligence.

"The law will not permit him to deny notice by insisting that he had not read the deed": *Wailes v. Cooper*, 24 Miss. 208; *Wade on Notice*, sec. 308; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 169.

Upon the facts of this case, the holders of the land during the life estate must be held to have known the nature and duration of their estate, and to have improved it for themselves, taking the risk of its duration, and nothing is shown to entitle the life tenant to pay for improvements.

The averment that the remaindermen stood by and permitted the improvements to be made, and did not give notice of their claim, is not sufficient to sustain the claim of an estoppel against them, because there is nothing to show an obligation on them to interpose.

The claim of title under the tax title set forth by the cross-bill cannot be maintained. A tenant for life cannot acquire a tax title to the defeat of the remainderman.

The decree overruling the demurrer to the cross-bill is reversed, the demurrer sustained, and cause remanded.

NOTICE, WHAT IS IMPARTED through the recitals of a deed: Note to *Graff v. Castleman*, 16 Am. Dec. 754, 755. A purchaser under a deed which calls for a map upon which certain streets are laid off cannot claim ignorance of such streets as defined in such map: *Smith v. Navasota*, 72 Tex. 422; and so a purchaser is charged with notice of a lien upon the realty purchased, created thereon by a will which constitutes a link in his chain of title: *Manifold v. Jones*, 117 Ind. 212. Purchasers are deemed to have examined every deed and instrument of record affecting their titles, and to have notice of every fact disclosed by such records, and of every other fact which upon inquiry might have been ascertained from the suggestions given by the records: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note 829; compare

numerous cases cited in note to *Hockenfull v. Oliver*, 12 Am. St. Rep. 238. But notice by record is only as to what appears upon the face of the instrument recorded: *Bailey v. Galpin*, 40 Minn. 319. Possession of land under an unrecorded deed is equivalent to registration, so long as the possession lasts: *Hiller v. Jones*, 66 Miss. 636.

IMPROVEMENTS. — The life tenant, who makes improvements during the life estate, cannot receive the benefits therefor under the occupying claimant's law: *Smalley v. Isaacson*, 40 Minn. 450; *Barrett v. Stradt*, 73 Wis. 385; 9 Am. St. Rep. 795, and note 805, 806, upon the subject of improvements generally; *Thurston v. Dickinson*, 2 Rich. Eq. 317; 46 Am. Dec. 56.

TAX TITLE AGAINST REMAINDERMAN OR REVERSIONER. — A tenant for life cannot purchase and hold under a tax title adversely to the remainderman or reversioner: Note to *Blake v. Howe*, 15 Am. Dec. 689, 690; for a life tenant in possession who purchases an encumbrance upon or an adverse title to the estate will be presumed to have made the purchase for the benefit of the remainderman or reversioner: *Whitney v. Salter*, 36 Minn. 103; 1 Am. St. Rep. 656; see note to *Allen v. De Groodt*, *post*, p. 628.

BURNLEY v. TUFTS.

[66 MISSISSIPPI, 42.]

SALES — DESTRUCTION OF PROPERTY BEFORE TITLE IS ACQUIRED. — Where the buyer unconditionally and absolutely promises to pay a certain sum for personal property, the title to which is to remain in the seller until full payment is made, the fact that the property is destroyed by fire before the time for the last payment to be made arrives, and while in the custody of the buyer, does not relieve the purchaser from the payment of the full price agreed upon.

ACTION for the purchase price of personal property. Burnley bought a soda-water fountain of Tufts, and gave his notes, falling due at different times, in payment therefor. These notes stipulated that the title to the property should remain in the seller until the payment of the last one, and in default of the payment of any of them, he was to retake possession. After several of the notes had been paid, and while the apparatus was in the possession of the buyer, it was burned without his fault. He then refused to pay the remaining notes, claiming that the loss should be borne by Tufts. The latter obtained judgment, and Burnley appealed.

H. C. Conn, for the appellant.

H. B. Mayes, for the appellee.

COOPER, J. Burnley unconditionally and absolutely promised to pay a certain sum for the property the possession of which he received from Tufts. The fact that the property has been

destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do: *Singer Mfg. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20; *Keitt v. Counts*, 15 S. C. 493.

The judgment is affirmed.

SALES. — Where the owner of a quantity of corn in bulk sells it to another, or a part of it, and the buyer pays for all the corn he buys, but only takes away a portion of it, leaving the balance with the vendor without any storage charges, any loss must be borne by the buyer: *Waldron v. Chase*, 37 Mo. 414; 59 Am. Dec. 56; but so long as a sale is unconsummated, the loss will fall upon the vendor: *Williams v. Allen*, 10 Humph. 337; 51 Am. Dec. 709. And where one buys goods to be delivered to another at a certain time, before which time they are destroyed by a flood, if he bought them under a contract to sell, he must bear the loss: *Black v. Webb*, 20 Ohio, 304; 55 Am. Dec. 456, and note; compare *Farmers' etc. Co. v. Gill*, 69 Md. 537; 9 Am. St. Rep. 443.

In *Randle v. Stone*, 77 Ga. 501, where a note was given for the purchase-money to be paid for an engine and boiler, in which was this condition: "It is furthermore the express condition of the delivery of said engine and boiler to me that the title, ownership, or possession does not pass from the said O. M. Stone & Co. until this note and interest is paid in full, and they may take possession of said engine and boiler, and sell the same for my account at any time in case this note is not promptly paid, in which case I hold myself liable for any and all losses or damages caused by my failure to meet this note," — and before the maturity of the note the engine and boiler were destroyed by fire, the loss fell upon the vendors, because the title remained in them. This decision seems irreconcilable with that in the principal case.

JACKSON v. STATE.

[63 MISSISSIPPI, 80.]

CRIMINAL LAW — EVIDENCE — NEWSPAPER REPORT OF DECLARATIONS OF ACCUSED. — A newspaper reporter may testify that his report of an interview with the accused, relative to the facts of the crime as published, is an accurate statement of what occurred between him and the prisoner; and he may adopt it as his testimony, though he is not willing to affirm that it is verbally accurate, or that it contains all that the accused said.

CRIMINAL LAW — KILLING FLEEING FELON. — Under the common law, and section 2878 of the Mississippi code, it is lawful to kill a fleeing felon when he cannot otherwise be taken, and the necessity for such killing is for the jury to determine.

CRIMINAL LAW — KILLING FLEEING FELON — JUSTIFICATION OF OFFICER. — An officer who kills one for whom he has a warrant of arrest for felony must satisfy the jury that he tried in good faith, and with reasonable prudence and caution, to make the arrest, and was unable, because of the flight of the person, to secure him; that he killed him when other means had failed, and when the arrest could not be made without resort to the means employed.

CRIMINAL LAW — JUSTIFICATION OF OFFICER FOR KILLING FLEEING FELON. — The jury are the judges of the necessity of killing a fleeing felon by an officer; and their verdict should be based upon the consideration of all the circumstances attending the officer and the deceased at the time; and if they entertain, from the evidence, a reasonable doubt whether the killing was necessary, they should acquit the officer.

CRIMINAL LAW. — Evidence of directions given an officer when a warrant of arrest was placed in his hands is inadmissible on his trial for killing a person claimed by him to have been a felon fleeing from arrest.

INDICTMENT for the murder of one Tingstrom. A warrant for the arrest of deceased on a charge of grand larceny was placed in the hands of the accused to be served. This the accused attempted to do, and when near the deceased, ordered him to "stop, hold up," but he kept on going. The officer then told him: "Hold up; I have a warrant for you"; but the deceased kept on going away. The officer, after following a short distance, told him: "Stop, or I will shoot you." The deceased had a gun in his hands, and turned as if to shoot, when the officer shot and killed him. At the trial, one McCaleb testified that he was a reporter on the Vicksburg Herald, and that he had an interview with the accused after the killing, when the circumstances thereof were voluntarily stated by the accused. This interview, after being written out, was read to the accused, pronounced correct by him, and then published in the paper. The witness testified that he did not recollect what was stated at the interview independent of the

published statement, but that he did know that that was substantially correct. He read this statement to the jury as his evidence, against the objection of the accused. An offer to prove by one Clay that when the warrant of arrest was given to the accused it was read and explained to him, and that he was informed what to do under it, was ruled out by the court. Defendant was convicted, and appeals.

McCabe and Anderson, for the appellant.

T. M. Miller, attorney-general, for the state.

CAMPBELL, J. The testimony of the witness McCaleb was properly admitted. As we understand the record, he testified that his report of the interview with the prisoner, as published, was an accurate statement of what occurred between him and the prisoner, and he adopted it as his testimony, but was not willing to affirm that it was verbally accurate, or that it contained all that the prisoner said. It accords with both English and American authorities in such case to admit the testimony. See note to *Union Bank v. Knapp*, 15 Am. Dec. 194, for an intelligent presentation of the true rule on this subject.

No error was committed in excluding the testimony of Matt Clay, Jr.

By the common law, it is lawful to kill a fleeing felon, where he cannot otherwise be taken, and the necessity of such killing is a fact for the jury to determine. "If the warrant be for felony, flight is tantamount to resistance, and the fleeing felon may be justifiably killed, if he cannot be otherwise secured," was the utterance of a judge in *Rex v. Finnucane*, 1 Craw. & D. 1. It is required that the officer shall act with caution and prudence, and shall not precipitately resort to fire-arms as a means of making an arrest.

Our statute, section 2878 of the code, makes homicide justifiable "when necessarily committed in arresting any felon fleeing from justice," and is merely declaratory of the common law on this subject. The officer who kills one for whom he has a warrant for felony must satisfy the jury trying him for the homicide that he tried in good faith, and with reasonable prudence and caution, to make the arrest, and was unable, because of the flight of the person, to secure him, and that he resorted to the severe means employed when other proper means had failed, and when, as determined by the state of

things as between him and the fleeing felon, the arrest could not be made without a resort to the means employed.

The jury is to judge of the necessity to kill, claimed by the officer as a justification of the killing, and the fact should be determined by a consideration of all the circumstances attending the officer and the deceased at the time, and a reasonable doubt whether the killing was necessary or not should secure the acquittal of the officer.

Tried by these views, the jury was wrongly instructed.

The first instruction for the state is an invasion of the province of the jury, because it directs a conviction if the jury believes certain things stated in it, and does not have reference to the circumstances attending the parties, as shown in evidence, which the jury, but for the instructions, might have considered as justifying the killing. The alleged necessity for the killing, being a fact for the jury to determine, should be left to the jury without any opinion from the court as to the influence of any given facts, or their insufficiency to establish a particular conclusion. The same objection applies to the second and third instructions for the state.

The fourth instruction is not correct as applied to this case. The accused claimed to have killed the deceased under circumstances which justified it, because of necessity, and the jury should have been allowed to pass on that question of fact.

The fifth instruction for the state is of doubtful meaning and questionable propriety. What idea is contained in the word "apparently," employed in it, is not apparent to us.

The court instructed the jury quite fully and liberally for the accused. Most of the instructions refused were properly refused, but the fifteenth and sixteenth asked by him should have been given. Undoubtedly, if the jury believed that the killing was probably necessary to prevent the escape of the fleeing felon, the accused was entitled to an acquittal, and that is the proposition contained in these instructions.

Reversed, and remanded for a new trial.

CRIMINAL LAW — JUSTIFIABLE HOMICIDE. — Killing to effect the arrest of one fleeing from a felony is justifiable, if the arrest cannot be made without killing the criminal: Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 162, 163; *Brooks v. Commonwealth*, 61 Pa. St. 352; 100 Am. Dec. 645; and so may a killing be justifiable which is absolutely necessary to prevent the escape of a felon: Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 163, 164.

WITNESSES — MEMORANDA TO REFRESH MEMORY. — Memoranda, either copies or originals, may be used by a witness to refresh his memory and

awaken recollection: Note to *Union Bank v. Knapp*, 15 Am. Dec. 194, 195. A witness who made or assisted in making written receipts or other written memoranda, with reference to the events under consideration, at the time of their occurrence, may refer to them, when he is being questioned upon the stand, for the purpose of refreshing his memory: *Sanders v. Wakefield*, 41 Kan. 11; extended note to *State v. Bacon*, 98 Am. Dec. 619-623; *Card v. Foot*, 56 Conn. 309; 7 Am. St. Rep. 311, and note.

BOARD OF SUPERVISORS OF HARRISON CO. v. SEAL.

[66 MISSISSIPPI, 129.]

DEDICATION. — To CONSTITUTE A HIGHWAY OR STREET BY DEDICATION, which the public authorities are bound to repair, there must be an acceptance of it as such by such authorities, and this may be proved either by formal acceptance, by repairing, or probably by the use of it by the public for many years with the knowledge and assent of such authorities.

DEDICATION. — WHILE ACCEPTANCE BY FORMAL ADOPTION by public authorities or by public user is necessary to impose on the public the duty to keep in repair a dedicated highway or street, still that is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction, or to subject the dedication to the public use, whenever, in the estimation of such authorities, the wants or convenience of the public require it for the purpose for which it was originally given.

W. G. Evans, Jr., for the appellants.

W. P. & J. B. Harris, for the appellee.

COOPER, J. About fifty years ago a company called the Mississippi City Company procured a body of land in Harrison County, lying on the Gulf of Mexico, and laid it off into streets, blocks, and public squares. According to the plan of the company this was to be the site of a great seaport city, and they gave to it the name of Mississippi City. A plat was made and filed in the office of the clerk of that county, as we infer from references made to it in certain conveyances found in the record of this cause. A copy of that plat is in the record, and from it we learn that there were nearly three hundred squares, bounded by streets numbered from 1 to 17, running east and west, and by about an equal number, named for different states, running north and south. The prospective city was intersected by a street named on the map Railroad Street, over which a prospective railroad was to run to a real depot-building and wharf, which the company then and there built, and then became insolvent. The whole property was sold under execution and bought in by one Tegarden. Railroad Street, as laid

down on the map, is shown to have been 110 or 120 feet wide. After his purchase Tegarden sold a number of lots according to the plan of Mississippi City, several of which abutted upon Railroad Street, and are described in the conveyances made as bounded by it; in one or more of the deeds it is expressly covenanted by him that Railroad Street shall be left open forever, but the grantor frequently, in making other conveyances, reserved the right to close up other streets appearing on the map. One of the lots thus situated on Railroad Street was conveyed to the county authorities of Harrison County for the site of a court-house and jail, and the same were there located and yet remain. Directly opposite the court-house, and across Railroad Street, is the post-office, and there are several residences on lots abutting on that street. Mississippi City never became a city or even an incorporated village, in consequence of which there are no streets adopted as such by municipal authority, but the strip of land called Railroad Street has always remained open, except as encroached upon on the one side or the other by those who have built residences along its boundary. It has never been accepted by the county authorities as a public highway by an order entered on its minutes, but it has been occasionally worked upon as a highway by the overseers of the roads, but only at points remote from the court-house, where, by reason of its passing through swampy ground, work has been necessary to keep it in repair; within the limits extending from the court-house to the point of controversy in this suit, no work seems ever to have been needed, because of the sandy character of the land, and consequently none has been done. When Tegarden, the owner of the land, saw that there was but little prospect of building up a town upon his land, many of the streets laid down in the plat were closed up, and the land was sold in lots, laid off without regard to the location of the numerous streets. Some evidence appears in the record tending to show a purpose on his part of cutting down the width of Railroad Street to thirty feet, the limit of a country road. The extent of the evidence is, that he claimed the right to do so, but it is not shown that those to whom he had conveyed lots situated on the street yielded to his claim, or that he ever attempted to take actual possession of the excess over thirty feet. In the year 1879 the heir at law of Tegarden conveyed Railroad Street, or so much of it as exceeded thirty feet in width, by metes and bounds, to the appellee, who has had it assessed as his property and paid taxes on it since

that time. The board of supervisors of Harrison County have recently caused a public road to be laid out which crosses Railroad Street, and not recognizing any right in the appellee to the land located within the limits of that street, failed to notify him of their action, or to award any damages for its use. The appellee thereupon exhibited this bill to enjoin the board of supervisors and the overseer appointed to work the road thus laid out from interference with his land until there should be a formal condemnation and award of damages. The injunction having been made perpetual on final hearing, the board of supervisors prosecute this appeal.

It is conceded by appellant that the evidence of an intention by Tegarden to make the dedication is ample, but the objection is made that there was no local authority to accept the dedication to its entire extent, and that the power of county authorities to accept a highway does not extend to one more than thirty feet wide, that being the width to which a public road is limited by law. As to a road thirty feet wide there is no controversy, the complainant contending only for the excess over that quantity.

It seems to be well settled, that to constitute a highway which the public authorities are bound to repair there must be an acceptance of it as such by the constituted authorities, which may be proved either by a formal acceptance or by repairing, and probably by the use of it by the public for many years, with the knowledge and assent of the local authorities.

But the question here involved is not whether the county is bound to keep in repair the whole of Railroad Street as a public highway, but whether the owner of the fee can exclude the public use, or demand compensation for the land. It seems to be well settled that he cannot.

In *Beatty v. Kurtz*, 2 Pet. 566, a lot of land on the plan of the town of Georgetown was marked by the owner "for the Lutheran church," and though there was no incorporated church to accept the dedication, it was held that, a congregation of that faith having used it for the purposes intended, the owner could not resume the property.

In *Cincinnati v. White*, 6 Pet. 432, a public square and way was marked upon the plan of the town by the owners, and lots sold with reference to it. The town was not then incorporated, but the public used the property. It was decided that the absence of a grantor capable of accepting the pr—

was immaterial, and that the dedication was so far consummated as to preclude the owner from revoking the dedication.

In *Rowan's Executors v. Town of Portland*, 8 B. Mon. 232, the controversy was in reference to the effect of a plat of the town by the owner of the land, sale of lots with reference thereto, and use by the public of the streets laid down on the plan; and the court said: "The mere laying out of a town upon a man's own land, and by his own private act, and the making and recording of a plan of the town, may not, and, as we suppose, do not, of themselves, conclude him to any extent. The land, notwithstanding these acts, is still his own; and neither any other individual nor the public have any right to interfere with such use of it as any man may make of his own. Though he has laid out a town upon the land and on paper, he is not bound to sell the lots, or to make or authorize the making of a town in fact. If he never disposes of a lot or lots, as part of a town, no one has any interest in the town as such, or any right growing out of his acts in relation to it. But in selling to others the lots laid off as parts of the town, he creates in them an interest in the town and its plan which places both beyond his future control to their injury, unless by the consent of the vendees, or by reacquiring the lots which he had sold to them before any other actual interest in the town had grown up. And as we suppose that, in the case of a town thus established or made by the private acts of the proprietor, he might, by a repurchase of all the lots before any actual use of the streets and other open places by the public, reinvest himself with the same rights and dominion which he had before any sale, it would seem to follow that the public at large does not acquire immediately from the proprietor, even by his act in selling and conveying the lots, any absolute or indefeasible right or interest in the existence or plan of the town, or in any of the advantages which it promises. But this right, vesting at first in the purchasers of lots, and as appurtenant thereto, and subject to be defeated by their reconveyance of the lots to the proprietor before the land is appropriated to any actual uses of a town, becomes consummated and indefeasible by such appropriation; and being thus perfect in the lot-owners, results necessarily to all who, by residence, business, or in any other manner, may have an interest in the town or in the use of all or any of its various parts and divisions, for the purposes which, by its plan, they are to be or may be appropriated."

The case of *Holmes v. New Jersey City*, 12 N. J. Eq. 299, relied on by counsel for appellee, goes only to the extent that a private owner may not, by his own act of dedication, impose on the public authorities the duty of repairing the way dedicated, and perhaps when the width of highways is fixed by law, that there may not be an acceptance of a way of greater width as such. But it is well settled in that state that a dedication expressly made cannot be revoked, even though not accepted by formal adoption.

In *Hoboken Land Co. v. Mayor of Hoboken*, 36 N. J. L. 540, the court said: "It was argued that the dedication had not been consummated when the suit was brought, by reason of the absence of an acceptance or use by the public of that part of the street in controversy. That question has been set at rest in this state. Acceptance by a formal adoption by the public authorities or by public user is necessary to impose on the public the duty to amend or repair, but it is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction or subject the dedicated land to the public use, whenever, in the estimation of the local authorities, the wants or convenience of the public require it for that purpose."

To the same effect are *Methodist Church v. Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696; *Mayor etc. v. Morris Canal Co.*, 12 N. J. Eq. 558; *Irwin v. Dixon*, 9 How. 10; *Trustees v. Cowan*, 4 Paige, 510; *Hannibal v. Draper*, 15 Mo. 639; *Matter of Seventeenth Street*, 1 Wend. 262; *Matter of Lewis Street*, 2 Id. 472; *Wyman v. Mayor of New York*, 11 Id. 486.

The decree is reversed, the injunction dissolved, and the bill dismissed. The cause will be remanded to the court below.

DEDICATION — WHAT IS A VALID DEDICATION TO PUBLIC USE. — There is no form necessary for the dedication of land to a public use; all that is necessary is the assent of the owner of the land and the fact of its being put to the public use for which it was dedicated: *County of Yolo v. Barney*, 79 Cal. 375; 12 Am. St. Rep. 152, and note citing cases upon the law applicable to dedication generally. The simple fact of dedication to the public of an alley makes it a public way, and no further action is required on the part of the city to open it for the general use of the public: *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186, and note 189, as to what constitutes a dedication. The essential of a common-law dedication of land to the public is the unequivocal intention of the owner to dedicate, which must be clearly manifested: *Village of White Bear v. Stewart*, 40 Minn. 284; but even with the presence of the manifest intention of the owner to dedicate, to complete the dedication there must be an acceptance by the public: *Moore v. Johnston*, 87 Ala. 220; and acceptance on the part of the public may be evidenced by

express public acts: *Kemper v. Collins*, 97 Mo. 644; or by user for the purpose intended by the dedicator: *Spaulding v. Bradley*, 79 Cal. 449; *Wolf v. Brass*, 72 Tex. 133; yet a casual user by the public in crossing over uninclosed land by a mere temporary license of the land-owner will not of itself constitute an acceptance of a dedication, where such user was the same before the alleged dedication as it was after it: *Eureka City v. Croghan*, 81 Cal. 524. Where a dedication is sought to be proven and established by user, such user must appear to have been with the knowledge and consent of the land-owner, unless it has been continued for a period of five years or more: Cal. Pol. Code, sec. 2619; *Hope v. Barnett*, 78 Cal. 9. The acceptance of a dedication on the part of the public must be made before a revocation of the offer by the owner to dedicate, because such an offer may be revoked by the owner at any time prior to a public user: *Eureka City v. Croghan*, 81 Cal. 524. The acceptance by a city of a charter under an act of the legislature, providing that "all the tract of land included in the plan of said town be and is hereby declared to be the limits of the same in conformity to said plan," is an acceptance of all the streets dedicated: *City of Demopolis v. Webb*, 87 Ala. 659.

BONELLI BROTHERS v. BLAKEMORE.

[66 MISSISSIPPI, 136.]

HIGHWAYS — RIGHT OF WAY is an interest in lands, and a grant of such a right by parol is obnoxious to the statute of frauds.

HIGHWAYS — RIGHT OF WAY BY PRESCRIPTION can only be claimed after the right has been exercised for an uninterrupted period of ten years.

HIGHWAYS — RIGHT OF WAY — "APPURTENANCES." — A vendee of a portion of a parcel of land owned by his vendor cannot obtain a right of way in the remaining land of the vendor, from the use of the word "appurtenances" in the grant.

APPURTENANT EASEMENTS. — RIGHT WHICH OWNER EXERCISES IN PASSING ACROSS ONE part of his land in using another part is not an easement appurtenant to the land, as no man can have an easement in his own property.

EASEMENTS. — RIGHT TO PASS OVER THE PROPERTY OF ANOTHER is an easement which passes by grant of the property and its appurtenances.

HIGHWAYS — WAY BY NECESSITY. — Where land is conveyed surrounded by other lands of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied as an incident to the grant; or where land is conveyed by designation merely, and not by metes and bounds, such other land not covered by the buildings or curtilage, as by its use has become essential to its use or enjoyment, passes by the grant, not strictly as implied therein, but included as part of the thing expressly granted.

EASEMENT NOT OF STRICT NECESSITY does not pass by implied grant, unless apparently permanent, obvious, and continuous.

CONTINUOUS EASEMENT IS ONE WHICH MAY BE USED and enjoyed without the intervention of the act of man, as a spout discharging rain-water.

NON-CONTINUOUS EASEMENT IS ONE to the enjoyment of which the act of the party is essential. Of this class, a way is the most familiar.

EASEMENT NOT OF STRICT NECESSITY will not pass by implied grant, unless it is apparent and continuous.

Catchings and Dabney, for the appellants.

McCabe and Anderson, for the appellees.

COOPER, J. In the year 1849 one Emanuel became the owner of a part of square 258 in the city of Vicksburg, which square is bounded on the east by Washington Street, and on the north by Grove Street. His lot fronted on Washington Street, and extended back one hundred and three feet on Grove Street. On this lot he erected two storehouses, each fronting on Washington Street, and extending back eighty-eight feet, leaving a vacant space in rear of the buildings of fifteen feet. The declivity from Washington Street westward is so great that what is the basement of the buildings in front is above ground, forming the lower story in rear. The buildings are, therefore, three stories in rear, and two stories and a basement in front. One of these buildings extended along Grove Street, and there was a door in the side opening out on Grove Street, by which access was had to the lower story or cellar. This is designated as lot 91 in the pleadings and evidence. In the rear of the other building (93) there was a door leading from the first floor to the vacant space. In front there was in each building a stairway leading to the basement; the two buildings had one common hall. In 1859 Emanuel made contemporaneous conveyances,—one to Duff, Green, & Co., of lot 93, the other to Cobb, Manlove, & Co., of lot 91. The conveyances were of the lots by metes and bounds, describing the land on which the respective buildings stood and the vacant space in rear of each, granting to each purchaser the lot and its appurtenances.

Cobb and Manlove believed that by reason of the situation of the lot conveyed to Duff, Green, & Co., its owners had a right of way across lot 91 to reach Grove Street, and Duff, Green, & Co., being under the same impression, exercised the privilege of passing across said lot so long as the two firms occupied the buildings. In 1859 or 1860, each firm, desiring to enlarge its building, the second and third stories were extended back to the rear of the lot, but an archway was cut in the wall of building 91, where the vacant space opened out on Grove Street, and a corresponding arch was also cut in the partition wall, the lower story not being extended in either building. Duff, Green, & Co. still had access to the first or cellar floor, by driving drays, etc., through the archways to the rear of their building. In 1863 lot 91 was bought by one Barbour, who was examined as a witness, and testified that at that

time Duff, Green, & Co., having engaged in a business that did not require the use of the cellar, made no attempt to use the way across lot 91, and that they set up no claim to a right so to do. Some time after this purchase and occupancy by Barbour, he built a stable in the alleyway on his lot, the arched way on Grove Street being used as the doorway to his stable. Things remained in this condition until 1871, when another occupant having moved into lot 93, with whom Barbour was not on friendly terms, he closed up the archway in the partition walls by nailing plank across the same. After this, the appellant Bonelli became tenant of both buildings, and tore out the stable erected by Barbour and built another one, which was partly on lot 91 and partly on lot 93. Bonelli has now become the owner of lot 91, and has torn down the stable erected on both lots by himself and nailed up the archway in the partition wall. Complainants, who are the owners of lot 93, exhibited the bill in this cause to enjoin him from obstructing the way which they claim to have across lot 91 to Grove Street.

There is no distinct averment in the bill that the way claimed ever was used by Emanuel during his ownership of the property, but since a decision against complainants on this ground would probably result in an amendment of their bill, and since, in any event, they are not entitled to the relief asked, we deal with the cause as though the allegation of such use had been specifically made.

Complainants contend that a right of way exists, first, by implied grant in the conveyance from the common owner to Duff, Green, & Co., or if this point be decided against them, then that Duff, Green, & Co., under whom they claim, secured the right by parol from Cobb, Manlove, & Co., and if mistaken in this, then they claim that the right has been acquired by prescription.

The second and third propositions may be disposed of in a word. A way is an incorporeal hereditament, and since livery of seisin could not have been made of it at common law, it could only be created by deed or other writing; it is therefore said to lie in grant: *Greenleaf's Cruise on Real Property*, tit. Deed, c. 4, secs. 35, 36.

But a right of way is an interest in lands, and a grant by parol is obnoxious to the statute of frauds: *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255; *Richter v. Irvin*, 28 Ind. 27; *Hall v. McLeod*, 2 Met. (Ky.) 98; 74 Am. Dec. 400; *Kerr on Statute of Frauds*, sec. 718.

The authorities cited by counsel for appellees are cases of dedication of public ways, and rest upon the doctrine of estoppel *in pais*. They are not required to be in writing.

The evidence does not support the claim of a way by prescription. It does not appear that the right was exercised for an uninterrupted period of ten years at any time.

The proposition most confidently advanced by appellees is, that the way passed to Duff, Green, & Co., either as a part of the land conveyed, or as a necessary incident thereto, by implied grant, or that it passed by use of the word "appurtenances" in the deed.

The use of the word "appurtenances" adds nothing to the force or effect of the deed. Emanuel was the owner of the whole property, and as owner exercised the right of passing across one part in use of the other; but the right was not an easement appurtenant to the land, for no man can have an easement in his own property. If Emanuel, as owner of this property, had also enjoyed a right to pass over the property of another person, such right would have been an easement, and would have passed by the grant of the property and its appurtenances. But the use of that word proper to convey an easement already existing is not sufficient to evidence a purpose to create an easement when none existed before. If by the conveyance to Duff, Green, & Co. an easement was granted at all over the other lot, it must be implied from the general grant, and not from the use of the word "appurtenances": *Wally v. Thompson*, 1 Bos. & P. 375; *Oliver v. Hook*, 47 Md. 301; *Gayetty v. Bethune*, 14 Mass. 49; 7 Am. Dec. 188; *Parsons v. Johnson*, 68 N. Y. 62; 23 Am. Rep. 149.

The principle from which the doctrine of implied grants of easements over other lands of the grantor springs is said to be found in the maxim that "one shall not derogate from his grant," and the kindred one that the purchaser takes the land bought, and whatever right in the hands of the grantor as is necessary to its enjoyment.

If one sells to another a tract of land surrounded by other lands of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied from the grant made. And to this extent are all the authorities.

So when a conveyance is made of real estate by designation, and not by metes and bounds, as the manor of A, or as Black-acre, or when property devoted to a trade or business, as a

mill or tan-yard, is conveyed by words describing the property as such, other land than that covered by the building or curtilage, that by its use has become essential to the enjoyment or use of the buildings, passes to the grantee. But land cannot be appurtenant to land, and such other lands pass, not as appurtenant or incident to thing granted, but as a parcel of the thing itself.

In the case of a way by necessity, it is implied as an incident to the thing granted; when the conveyance is of the land by designation, not by metes and bounds, the connected lands pass, not strictly by implied grant, but as included as a part of the thing expressly granted. The authorities run in an almost unbroken current in support of the right of the grantee under the above-named circumstances, but some diversity is encountered when we pass into the field of implied grants of things not necessary (strictly necessary), but only highly convenient, or essential to the full enjoyment of the land bought.

The owner of a tract of land, a part of which he afterwards grants to another, has not, of course, any easement in any part of his land while he owns the whole; he deals with it as owner, and may subserve any portion to the use of the other, and may change the arrangement at his will; it is only where such arrangement is apparently permanent, and intended so to be, and while so remaining the owner grants a part of the premises, that the question of easement or servitude can arise. The condition of the whole when the severance is made, the nature of the easement claimed to be granted or reserved by implication, its obviousness and continuousness, are the tests usually applied to determine the existence or non-existence of the grant or reservation.

The rule seems to be of very general recognition that an easement not of strict necessity does not pass by implied grant, unless it be apparently permanent, obvious, and continuous.

The word "continuous," in the sense here used, seems to have acquired a somewhat unusual significance within the meaning of the rule. It is not sufficient that the thing may be continuously subject to use or enjoyment, but that it may be used without the intervention of the act of man.

A continuous easement is one, say the authorities, which may be enjoyed without any act on his part, as a water-spout, which discharges the water whenever it rains; a drain, by which surface water is carried over land; windows, through which light and air enter, etc.

A non-continuous easement is one to the enjoyment of which the act of the party is essential, and of this class a way is the most usual: *Lampman v. Milks*, 21 N. Y. 505; *Poden v. Bastard*, L. R. 1 Q. B. 156; *Providence Tool Co. v. Corliss Steam Co.*, 9 R. I. 564; *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750, and note; *Duston v. Ledden*, 23 N. J. Eq. 64.

The decided weight of authority, both English and American, is to the effect that an easement, not of strict necessity, will not pass by implied grant, unless it be apparent and continuous: *Whally v. Thompson*, 1 Bos. & P. 371; *Pheysey v. Vickery*, 16 Wood. & M. 484; Goddard on Easements, 266 et seq.; *Oliver v. Hook*, 47 Md. 302; *Fetters v. Humphreys*, 19 N. J. Eq. 472, and cases cited above.

In Pennsylvania, a way fenced out, and devoted exclusively to purposes of travel, seems to be treated as a continuous easement: *Phillips v. Phillips*, 48 Pa. St. 178; 86 Am. Dec. 577; and an alley-way: *McCarthy v. Kitchenman*, 47 Pa. St. 239; 86 Am. Dec. 538. It is probable, however, that in that state the decisions go further, and establish the rule that a way, commonly and usually used, and highly convenient, would pass by implied grant: *Pennsylvania R. R. Co. v. Jones*, 50 Pa. St. 417. It was also suggested in *Watts v. Kelson*, L. R. 6 Ch. 186, that a paved roadway might pass by implied grant. In *United States v. Appleton*, 1 Sum. 492, Judge Story, not adverting to the distinction between continuous and non-continuous easements, held that where a window, opening upon a porch, had been in use as a way by the grantor across the porch to the street, an easement passed by implied grant, not only to light and air, but to the way across the porch. The authorities relied on by him are cases in which continuous easements had been held to pass. It may be noted that the cases cited by him from Massachusetts have been practically overruled in that state by subsequent cases. The law seems to be in that state now that no easement, whether continuous or non-continuous, will pass by implied grant, unless it be one of necessity: *Keate v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80.

Since the way claimed by complainant is not one of necessity, and is not of a continuous nature, it did not pass by the conveyance to Duff, Green, & Co., and of course has not been acquired by any of the subsequent conveyances under which complainants derive title. The complainants are therefore not entitled to the relief sought, wherefore the decree is reversed, and bill dismissed.

EASEMENTS. — WAYS OF NECESSITY: See note to *Mitchell v. Seipel*, 36 Am. Rep. 415-422; *Pettingill v. Porter*, 8 Allen, 1; 65 Am. Dec. 671, and extended note 675-681.

EASEMENT BY PRESCRIPTION. — To acquire a prescriptive right to an easement, it must have been continuously used and enjoyed during the whole time prescribed by the statute of limitations: *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, and note 574.

In *Black v. O'Hara*, 54 Conn. 17, where a private right of way by prescription was claimed over what had once been a public highway, now abandoned and fenced in, it was decided that the private right of way could be acquired only by adverse user; that user could not be adverse during the existence of the public highway, and that the adverse user must be for the full statutory period subsequent to the abandonment of the public highway.

In *Curran v. City of Louisville*, 83 Ky. 628, it was decided that mere non-user of an easement acquired by grant would not defeat the easement; and only an adverse use by the servient estate for a period sufficient to create a prescriptive right could do so.

In *Nowlin v. Whipple*, 120 Ind. 596, where a party, having used a private way for less than the period necessary to give him the prescriptive right, then under a license from the owner continued to use the way for thirty years and more, such latter use, being merely under a license, could not be adverse, and could not create an easement by prescription: *Buery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727.

EASEMENTS, HOW CREATED — STATUTE OF FRAUDS. — Right to permanently occupy another's land is an easement which cannot be acquired by parol agreement, but only by a written instrument or by prescription: *Walker v. Shackelford*, 49 Ark. 503; 4 Am. St. Rep. 61, and note; but this rule does not apply in cases of fraud on the part of the land-owner: *Stewart v. Stevens*, 10 Col. 440.

In *Cagle v. Parker*, 97 N. C. 271, it was decided that an easement could only be created by an instrument under seal, or by user for so long a period, that a conveyance by an instrument under seal would be presumed; but in *Huyck v. Andrews*, 113 N. Y. 61, 10 Am. St. Rep. 432, it is said that "an easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, etc., out of or over the estate of another."

ALEXANDER v. WESTERN UNION TELEGRAPH CO.

[66 MISSISSIPPI, 161.]

TELEGRAPH COMPANIES — LIABILITY FOR DELAY IN TRANSMITTING MESSAGE. — Where, in response to an offer to sell land, it is sought to accept the offer by telegraph, and a message authorizing the purchase is paid for and delivered to the authorized operator of the company, who is informed of the purpose of sending the message, and of the importance of its being sent and delivered promptly, but owing to the delay and negligence of the company and its agents in the transmission and delivery of the message, the purchase of the land is lost, the company is liable in damages for the difference in price at which the land was offered and its actual market value at the time the message should have been delivered.

TELEGRAPH COMPANIES — GENERAL DUTIES AND LIABILITIES. — Telegraph companies undertake to serve the public, and must perform their duties and comply with their contracts in good faith; and their failure to discharge their functions with reasonable care renders them liable in damages for losses and injuries that may be traced directly or with reasonable certainty to their negligence.

Brame and Alexander, and Wiley N. Nash, for the appellants.

E. H. Bristow, and Sykes and Richardson, for the appellee.

ARNOLD, C. J. These facts are stated, substantially, both in the original and the amended declaration. Appellee, as a corporation duly chartered, was engaged in the business of receiving and transmitting for hire telegraphic messages for the public; that its lines extended from Starkville, Mississippi, to Chattanooga, Tennessee; that appellants desired to purchase a certain lot of land in the latter place, and were informed on the 3d of December, 1886, by letter, from the agent of the owner of the lot, that it could be bought for three thousand dollars, and that if they wanted it at that price, to inform him by wire, on or by the 6th of December, 1886, of their acceptance; that on that day appellants delivered to the operator of appellee at Starkville a message, and paid the price for its transmission to the agent of the owner of the land at Chattanooga, in these words: —

“STARKVILLE, Miss., December 6, 1886.

“NEIL W. CAROTHERS, Attorney at Law, Chattanooga, Tenn.

“Yours of the 3d received, Get option till Monday, if can, if not, close the trade, and fix papers.”

That the message was delivered to the operator at Starkville, about one o'clock, P. M., on the 6th of December; that it was the intention of appellants to purchase the lot, and they were prepared to do so at the price at which it was offered, and that they would have secured it, and a good title to the same, if their message had been promptly delivered at Chattanooga; that at the time the message was delivered to the operator at Starkville, he was informed of appellants' purpose in sending it, and of the importance of it being sent and delivered promptly; that on account of the negligence of appellee, the message was not delivered at Chattanooga until about eight o'clock, P. M., on Tuesday, the 7th of December, 1886; that it resulted from the delay in the transmission and delivery of the message that the lot was sold to another before receipt of

the message on December 7th, and appellants lost the purchase and bargain, and sustained the actual loss and damages claimed; that upon being informed of their failure to obtain the lot, and of its purchase by another, appellants promptly endeavored to buy it from the purchaser, but could not get it for less than five thousand dollars; that although the lot was offered at three thousand dollars, it was of the market value of five thousand dollars, and at the time of the institution of the suit it had advanced in value so as to be worth eight thousand or ten thousand dollars.

Appellants claimed as damages the difference between the price at which the lot was offered to them and its actual market value at the time when the message should have been delivered at Chattanooga, and in the original declaration, the statutory penalty of twenty-five dollars allowed by the act of 1886 for the failure to deliver telegraphic messages within reasonable time was also claimed.

Appellees demurred to the original declaration, and assigned, in substance, for special causes of demurrer, that no cause of action was shown in the declaration; that the damages sued for were not actual and immediate, but remote, contingent, and speculative; that it was not shown that plaintiffs suffered any actual loss by the alleged negligence; that it did not appear that if the message had been promptly delivered the trade for the land would have been concluded; that the statutory penalty sought to be recovered, in connection with other damages, could not, under the constitution and laws of the United States, be enforced.

The demurrer was sustained, and leave given the plaintiffs to amend, and an amended declaration was filed, and to it there was a demurrer.

The special causes of demurrer to the amended declaration were in effect the same as those to the original, with the additional causes that it was not shown that the agent of the owner of the land had any authority in writing to sell or contract for the sale of the land, and that the message was not an absolute but a conditional acceptance of the offer made by the agent of the owner of the land.

The demurrer to the amended declaration was also sustained, and appellants declining to amend further, judgment final was entered against them, and they appealed, and assign for error the action of the court in sustaining the demurrers.

In any view of the case, appellants were entitled to recover

nominal damages, — the amount paid for the transmission of the message, — if no more, and for that reason the demurrers should have been overruled: *Parks v. Alta California Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168.

But they should have been overruled on broader grounds. If the facts stated in the declarations, and admitted by the demurrers to be true, do not constitute a good cause of action against the telegraph company, it is difficult to conceive what would. We construe the message to be an acceptance of the lot on the terms at which it has been offered; but whether it was or not, and whether or not it was of itself sufficient to close the trade for the lot, it is alleged in the declarations, and admitted by the demurrers, that if the message had been promptly transmitted and delivered, appellants would have obtained the lot, and that by the delay in the delivery of the message they lost the purchase, and suffered the loss and damages for which they sue. These allegations might have been avoided by facts, but not by demurrer.

In the face of the admitted fact that appellants would have procured the lot and a good title to the same if their message had been duly delivered, it was entirely immaterial whether Carothers, the alleged agent, had written authority to sell or not. That might have been an important matter in a suit between appellants and the owner of the lot touching the validity of the sale, but if appellants prove what they allege, it would be no defense to the telegraph company for a violation of its contract.

It is true that under the decision of the supreme court of the United States in *Western Union Tel. Co. v. Pendleton*, 122 U. S. 847, the penalty imposed by our statutes on telegraph companies for failure to deliver messages within a reasonable time, and which was claimed in the original declaration, cannot be enforced, because the message was to be delivered beyond the limits of the state; but that was no cause for sustaining the demurrer to the original declaration. The statutory penalty was but part of the amount claimed in a declaration of but one count. The demurrer was to the whole and not to a part only of the declaration. In such case, the demurrer must be overruled: 1 Chitty's Pleading, 665.

We do not find that the damages claimed fall within the category of being too speculative, remote, or contingent to be

recoverable. On the contrary, they appear to be the actual damages that resulted directly and naturally from the breach of duty and contract upon which the complaint is founded, and they are capable of being ascertained and established, not only with reasonable but with as near absolute certainty as any class of damages.

On the admitted facts, it requires no expansion of the just rules of law to hold the telegraph company liable for the damages claimed.

It seems like attempting to cut the throat of common sense and knock the brains out of reason to maintain the proposition that a man sustains no loss or injury cognizable by law when he is offered property for three thousand dollars, worth five thousand dollars in the market, and which he is ready and anxious to buy, but is prevented from doing so by negligence such as is disclosed in the record, and not denied or avoided by any excuse or justification.

In *Rittenhouse v. Independent Line Tel. Co.*, 44 N. Y. 263, 4 Am. Rep. 673, where the operator of the telegraph company made a mistake in the article ordered by telegram, it was held that the company must make good the difference between the price of the article actually ordered at the time when the dispatch should have been delivered, and the price of the same article if it had been purchased as soon as the mistake was discovered.

In *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, there was a failure by the telegraph company to deliver a message to buy certain stock, which advanced in price between the time when the message should have been delivered and the time it was purchased under another order. It was held that the company was liable for the amount of the advance in the price of the stock between these dates.

In *Western Union Tel. Co. v. Hyer Bros.*, 22 Fla. 687, 1 Am. St. Rep. 222, appellees, ship-brokers in Pensacola, having been engaged by a customer to charter a vessel, sent a telegram to their correspondent in Barbadoes, making an offer for the charter of a vessel. The offer was accepted, and a message sent to appellees informing them of the acceptance, but it was not delivered to them by the telegraph company. Their correspondent in Barbadoes, as their agent, signed the usual charter-party for appellees. Not receiving the answer to their message, they told their customers that they had failed to charter the vessel, whereupon he chartered another. Two weeks afterward the vessel

came to Pensacola, as required by the charter-party signed by appellee's agent in Barbadoes. They were compelled to re-charter the vessel at a loss, and it was held that the telegraph company was responsible to appellees for such loss, and for their time and exertions in rechartering the vessel.

In *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, it was decided that when a telegraph company receives, and for a valuable consideration agrees to transmit and deliver, a message directing the sale of cotton owned by the sender, and without lawful excuse fails to deliver the message in due time, the sender may recover the actual damages sustained by the fall in the price of the cotton between the time it would have been sold if the message had not been delayed and the time it was actually sold, with the qualification, however, that so soon as the sender discovered that his message had not been forwarded, it became his duty, within a reasonable time, to repeat the order or direction to sell, or to take other requisite steps to prevent further loss.

In *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156, plaintiffs, having received an offer of a cargo of corn at ninety cents per bushel, delivered to the telegraph company, to be sent to the person making the offer, the following message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered by the company, by reason whereof plaintiffs failed to obtain the corn on the terms offered, and the price of corn and freight immediately advanced, and plaintiffs lost the profits which they might have made thereon. It was announced by the court that the measure of damages recoverable in the case was the difference between the price named in the offer and that which plaintiffs would have been obliged to pay at the same place in order, by due diligence after notice of failure to deliver their telegram, to purchase the like quality and quantity of corn, with the same rule in relation to the freight.

In *Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877, a ship-broker desired to furnish a vessel for the use of another person, and if he had done so, he would have been entitled to certain commissions for his services. He dispatched to Liverpool for a vessel, and a message, requiring immediate reply, and offering a suitable vessel, was delivered to a telegraph company, to be communicated to the broker, but the company failed to deliver it to him within a reasonable time, and on that account the vessel was not obtained.

The broker sued the telegraph company, and recovered judgment for the amount of the commissions he would have earned if the message had been promptly delivered and the vessel had been secured, and the judgment was affirmed by the supreme court of Georgia.

In *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, Parks delivered a dispatch to the telegraph company, authorizing his agent to secure a debt due him from a third party by attachment. By the negligence of the company in transmitting the message, other creditors obtained the first attachments, and seized the whole of the property of the debtor. The court considered that the question of damages was one of fact, and found no difficulty in the case as far as ascertaining the amount of damages or the cause of them was concerned, and held that Parks was entitled to recover from the telegraph company the amount of his debt, if he could show that it was lost in consequence of the negligence of the company.

These cases, and others to the same effect which might be cited, impose no new or unusual burdens on telegraph companies. They simply apply old principles to new conditions. Such companies undertake to serve, and are under obligation to serve, the public generally, — all who choose to employ them. Their occupation is one of a public nature. The rapidity and accuracy with which they communicate intelligence commend them to popular favor and confidence. Much of the business and of the most important affairs of life are affected and controlled by telegraph companies. Negligence and unreasonable delay in their operations would impair their usefulness and render them a source of danger rather than of advantage to the public, if the law afforded no remedy. The law requires that their contracts shall be performed in good faith, and that their functions shall be discharged with reasonable care, and that they shall answer in damages for losses and injuries that may be traced directly or with reasonable certainty to their negligence.

Judgment reversed, demurrers overruled, and cause remanded.

IN THE CASE OF *Western Union Tel. Co. v. Allen*, 66 Miss. 549, the appellee was the person to whom three messages of a social nature were not delivered within a reasonable time, and he brought an action to recover the statutory penalty, charging neglect against the telegraph company. This statutory penalty was imposed by an act of the legislature of Mississippi, approved March

18, 1886, providing "that if any telegraph company shall neglect, fail, or refuse to transmit and deliver, within a reasonable time, without good and sufficient excuse, any message delivered to it for such purpose, the person injured shall receive [recover] the sum of twenty-five dollars in addition to such damages as are now allowed by law." The messages were delivered to the company, and the charges were prepaid; they were of no pecuniary value to the appellee, and he sustained no moneyed loss from their non-delivery. It was therefore claimed by the company that the appellee had no right of action under the statute. This presented the question whether any duty was assumed by a telegraph company to the person addressed in a telegram received for transmission with charges paid, and whether, for a breach of such duty, he may maintain an action against the company for neglect, in the absence of pecuniary loss to himself. In discussing this question, Cooper, J., said: "If it be true, as suggested, that the telegraph company by accepting the message for transmission comes under a duty to the addressee, it does not seem to be difficult to find equal liability for delay in its transmission or for failing to deliver as exists for the delivery of an altered message. Delay or neglect to deliver is as much a breach of duty, if a duty exists, as is the delivery of an altered message. The reason of the existence of such companies is not that by them messages may be more accurately transmitted than by the ordinary means of communication, but it is because they may be more rapidly transmitted; and it cannot be seriously contended that a telegraph company might be liable for an erroneous delivery on the ground that the nature of its business indicated to it the importance of delivering the exact message sent, and at the same time its responsibility denied for damages caused by delay in delivering the message because it is not advised by the nature of its business of the importance of speedy delivery." His honor then stated the rule as it prevails in England and in America, showing that opposite views are entertained in the two countries. In the former, the doctrine is announced that the company is under obligation to the sender of the message alone, owes the receiver no duty, and consequently is not liable for delay nor for the delivery of an altered message; while in the latter it is a universal doctrine that the company is liable for the delivery of a changed message, and therefore owes a duty to the receiver as well as the sender. After discussing the principles of law which uphold the American rule, and stating the grounds upon which it has been sustained, Judge Cooper said: "The fundamental principle is, that there is some breach of duty, and whether this duty is logically deduced from any well-recognized rules applicable to other relations becomes immaterial when there is a *consensus* of judicial opinion as to its existence. We are content to take our place in the line of American authorities, and, without assenting fully to either of the processes of reasoning by which the result has been reached, to accept as settled the rule of liability, because the telegraph company is a public agent, and as such, from the peculiar character of its business, is connected with the sendee of the message so far as to impose upon it a duty to deliver the intelligence intrusted to it for him. Whether this be property or simply an intangible thing of value to him, it is that which the company is under duty to communicate according to its course of business, and delay in the delivery is as much a breach of duty as the delivery of an altered message, and in either event recovery may be had by the sendee. In the case under consideration, though no pecuniary injury was sustained, there was a violation of the legal right of appellee, and a consequent right to recover damages, though nominal, and to this is added the penalty given by the statute."

TELEGRAPH COMPANIES. — For a discussion of the rights, duties, and liabilities of telegraph companies: Extended note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 486-500; also *Western Union Tel. Co. v. Mansford*, 87 Tenn. 190; 10 Am. St. Rep. 630, and note; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772, and note; *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699, and note. Under the Wisconsin statutes, a telegraph company is liable for damages resulting directly from its negligence, especially where the agent of the company transmitting the message is acquainted with the contents thereof: *Cutts v. Western Union Tel. Co.*, 71 Wis. 46; but under the Arkansas statutes, although a penalty is imposed upon telegraph companies for refusing to send messages, no penalty is provided for negligence in sending a message, so that one aggrieved by such negligence must seek his remedy by an ordinary action for damages: *Fronenthal v. Western Union Tel. Co.*, 50 Ark. 78. A telegraph company may limit its liability for ordinary negligence in sending unrepeatd messages to the amount paid for sending such message: *Pegram v. Western Union Tel. Co.*, 97 N. C. 57.

THEOBOLD v. LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY.

[66 MISSISSIPPI, 379.]

MUNICIPAL CORPORATIONS — STREET-RAILROAD — RIGHTS OF ABUTTING OWNER. — The construction and operation of a railroad in the street in front of the property of an abutting owner, without his consent, and without his being compensated, is an invasion of his legal rights, for which he may recover damages.

MUNICIPAL CORPORATIONS. — STREETS ARE ESTABLISHED for the accommodation of the public generally, in passing from place to place, and for other incidental and necessary uses. They are for the benefit of all, and no one has any exclusive rights or privileges therein.

MUNICIPAL CORPORATIONS. — STREET-RAILROADS ARE PERMANENT STRUCTURES in the streets, the use of which is private and exclusive. They confer upon individuals or corporations rights which are incompatible with those of the public or of adjacent proprietors.

MUNICIPAL CORPORATIONS. — LAYING OUT OF PUBLIC STREETS creates two co-existent rights, one belonging to the public, to use and improve them for ordinary purposes, the other belonging to the abutting owner, to have access to and from his property over them, and to make such use of them as is customary and reasonable. Both are valuable, and each is inviolable.

MUNICIPAL CORPORATIONS. — ABUTTING OWNER'S RIGHT TO USE THE STREET as a street is as much property as the street itself, and neither the public, a corporation, nor an individual can lawfully deprive him of it, against his will, without compensation.

MUNICIPAL CORPORATIONS. — WHERE STREETS ARE NEEDED FOR RAILROAD PURPOSES, or for any other purpose inconsistent with the ordinary use of a public street, the rights and interests of the abutting owners must be obtained, with their consent, or by the exercise of the right of eminent domain.

MUNICIPAL CORPORATIONS — STREET-RAILROADS — RIGHTS OF ABUTTING OWNERS. — Where the public have only an easement in the street, and the fee is in the abutting owner, a steam-railroad cannot be lawfully constructed and operated thereon against his will and without compensation.

MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF ABUTTING OWNERS. — Where the fee to a street is in the public, free from any trust or duty, it may be disposed of for any purpose that the public may deem proper; but whether the abutting owner has simply an easement in the street, while the fee is in the public, or some other person, or whether he has both the fee and an easement, he is entitled to require that nothing shall be done in derogation of his rights, without his consent, or without compensation.

TRESPASS against the appellee for constructing and operating a street-railway in front of and upon a lot of land owned by appellant, and extending to the center of the street, without his consent, and without any condemnation proceedings, to the great damage of his property. A demurrer to the complaint was sustained. The suit was dismissed, and plaintiff appeals.

Dabney, McCabe, and Anderson, and John N. Bush, for the appellant.

Murray F. Smith, for the appellee.

ARNOLD, C. J. Whether the abutting owner of land on a public street has such interest in the street as to require condemnation, or his consent, before the street can be lawfully used by a railroad company for constructing its track and operating its trains on the street, and to enable him to recover compensation for injuries sustained on account of the street being used for such purpose, is an open question in this state. There was some consideration of the subject in *Dannaher v. State*, 8 Smedes & M. 649, and in *New Orleans etc. R. R. v. Moyer*, 39 Miss. 374, but the question was not decided in either case.

In a few states, notably in Pennsylvania, such right in the adjoining owner is denied; but generally there is a juster appreciation and better definition of private rights and interests in regard to the matter.

It is obvious that the right of the adjacent owner to the free use of the street on which his property is located imparts value to the property, and that to deny or restrict his use of the street, by unusual, dangerous, and permanent obstructions and appliances placed in the street, would seriously affect the value

and enjoyment of his property. While the general public might be benefited by the existence of such obstructions and appliances, the adjoining owner might be greatly damaged, if not ruined, by them, if the law afforded him no remedy. Of such disadvantages, if any, as may result from the use of the street by the public, in the manner in which public streets are ordinarily used, he could not complain; but it seems clear that the construction and operation of a railroad in the street, in front of his property, without his consent, and without his being compensated, would be an invasion of his legal rights. This conclusion follows inevitably, unless railroads are among the objects for which public streets are originally designed. Can railroads be said to be among such objects?

A street is a public thoroughfare or highway, established for the accommodation of the public generally, in passing from place to place, and for such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas and water pipes, and the like. Public streets are for the use and benefit of all, and no one has any exclusive rights and privileges therein. They are free to all upon like conditions, and subject to use by any means of locomotion which is not destructive of the common uses and ordinary methods of travel. If this is true, a railroad does not fall within the purposes for which public streets were originally established, and the occupation of a public street by a railroad is an additional servitude on the land, and a perversion of the street from its original purposes. The introduction of a new motive power would not, perhaps, be material; but a railroad requires a permanent structure in the street, the use of which is private and exclusive. It confers upon an individual or corporation rights and privileges in the street which are incompatible with those of the public and of adjacent proprietors. To hold that a railroad is one of the legitimate uses of a public street leads to the inconsistency that the street may be monopolized by a corporation or an individual, and filled with parallel tracks which would practically exclude all ordinary travel, and still be said to be devoted to the ordinary uses of a public street: Lewis on Eminent Domain, sec. 111; 1 Hare on Constitutional Law, 362; Cooley's Constitutional Limitations, 678.

“When the owner of a tract of land lays the same out into lots and streets, and sells the lots, the purchasers of such lots acquire as appurtenant thereto a private right of way and access over the streets. This private right arises without any

express grant, and in the absence of any statute. The law presumes that the parties had in mind the advantages to be derived from the use of the proposed streets, and implies a right to such use as a part of the grant. If several persons, owners of distinct parts of a tract, should join in laying the same out into lots and streets, the result would be the same. The law would imply the grant of mutual easements of way and access appurtenant to the respective lots, in the absence of any statute or express mention of such easements. These private rights or easements are the presumed as well as the real consideration for the grant or dedication of a part of the tract to public use. If, instead of making a gift of the streets to the public, the proprietors should voluntarily grant the streets for a consideration agreed upon and paid by the public, it would still be true in fact, and therefore presumed in law, that, in fixing the consideration to be paid, the parties contemplated the advantages to be derived from the use of the streets; that is, the consideration to each proprietor would be the right to make use of the streets in connection with his lots, and a certain sum of money paid: Lewis on Eminent Domain, sec. 114. If the streets are established by the exercise of the right of eminent domain, the effect, in principle, should not be different: *Id.*

The laying out of a public street creates two co-existent rights, one belonging to the public, to use and improve the street for the ordinary purposes of a street, the other, to the abutting owner, to have access to and from his property over the street, and to make such use of the street as is customary and reasonable. Both are valuable, and the one is as inviolable as the other. It would be as unjust and unwarranted for the public to use and appropriate the street, so as to impair or destroy the rights of the abutting owner, without his consent and without compensation, as it would be for him, by a like course of conduct, to impair or destroy the rights of the public.

So that it appears that the abutting owner has special interests and rights in a public street, which are valuable and indispensable to the proper and beneficial enjoyment of his property. His right to use the street as a street is as much property as the street itself, and neither the public nor a corporation nor an individual can lawfully deprive him of it, against his will, without compensation. If the street is needed for the purpose a railroad, or for any other purpose inconsistent with the ordinary uses of a public street, the rights and inter-

ests of the abutting owner must be obtained with his consent, or be the exercise of the right of eminent domain, as in other cases of taking private property for public use: *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & M. R. R. Co.*, 7 Id. 479; *Crawford v. Village of Delaware*, 7 Ohio St. 460; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279; 48 Am. Rep. 342; *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268.

If the rights of the abutting owner may be taken from him without his consent or without compensation, "a system has been inaugurated," said the court of appeals of New York, "which resembles more nearly legalized robbery than any other form of acquiring property": *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268, 291.

The weight of judicial authority undoubtedly is, that where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, under the constitutional guaranty of private property a steam-railroad cannot be lawfully constructed and operated thereon, against his will, and without compensation: Lewis on Eminent Domain, secs. 113, 115; 1 Hare on Constitutional Law, 362; Mills on Eminent Domain, 2d ed., sec. 204; 2 Dillon on Municipal Corporations, 3d ed., sec. 725.

A distinction is made by some of the authorities in cases where the fee in the soil of the street is in the public, — the state, county, or city, — and where it remains in the abutting owner; and in the first case the right of the abutting owner to compensation is denied, and in the latter it is recognized and allowed. We perceive no well-founded difference in principle in such distinction. If the fee is in the public, it is held in trust, expressly or impliedly, that the land shall be used as a street, and it cannot be applied to any other purpose without a breach of trust. It is only where the fee is in the public, free from any trust or duty, that it may be disposed of for any purpose that the public may deem proper. Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights: 1 Hare on Constitutional Law, 370, 375; Lewis on Eminent Domain, secs. 114, 115; *Barney v. Keokuk*, 94 U. S. 324; *St. Paul etc. R. R. Co. v. Schurmeir*, 7 Wall. 272; *Story v. New York El. R. R. Co.*, 90 N. Y. 123; 43 Am. Rep. 146; 1 Rorer on Railroads, 524; *Haynes v. Thomas*, 7 Ind. 38; *Anderson v. Turbeville*, 6 Cold.

150; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Crawford v. Village of Delaware*, 7 Ohio St. 460.

It is apparent that there is difference between the ordinary horse-railway and the ordinary steam-railway, with reference to their use of a public street, but whether the difference is only one of degree, we are not called upon to decide in this case.

Judgment reversed, demurrer overruled, and cause remanded.

MUNICIPAL CORPORATIONS. — As to whether streets can be used for railroad purposes: *Stanley v. City of Davenport*, 54 Iowa, 463; 37 Am. Rep. 216, and particularly extended note 224-229. A street horse-railway may be placed and operated in a city street without compensation to the abutting owners, when the city has granted the right by ordinance in pursuance of legislative authority: *Eichels v. Evansville etc. R'y Co.*, 78 Ind. 261; 41 Am. Rep. 561; *Attorney-General v. Metropolitan R'y Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Hiss v. Baltimore etc. R'y Co.*, 52 Md. 242; 36 Am. Rep. 371; but see *Clark v. Stillwater Street R'y Co.*, 28 Minn. 373; 41 Am. Rep. 290; *Perry v. New Orleans etc. R'y Co.*, 55 Ala. 413; 28 Am. Rep. 740; and although a city owns the fee of its streets, it cannot authorize a steam-railroad to maintain its tracks upon them without compensating the abutting lot-owners who are specially injured thereby: *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279; 48 Am. Rep. 342; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note; *Daly v. Georgia etc. R. R. Co.*, 80 Ga. 793; 12 Am. St. Rep. 286, and note; *Fulton v. Short Route R'y Tr. Co.*, 85 Ky. 640; 7 Am. St. Rep. 619; compare *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and note 726; but see, *contra*, *Newell v. Minneapolis etc. R'y Co.*, 35 Minn. 112; 59 Am. Rep. 303.

RIGHTS OF ABUTTING LOT-OWNERS. — Abutting lot-owners, although they do not own the fee of the street, can recover damages of the railroad company, which result to them from an unlawful or improper use of the street by the railroad company, and this is true notwithstanding such company is operating its road upon the public street by permission: *Railroad Co. v. Bingham*, 87 Tenn. 522. But the city is not liable where, owning the fee in its own streets, it granted the privilege to a railway company to lay its track thereon, if the company would properly grade the street, and the company so graded the street and constructed its track thereon as to obstruct the view of an adjacent land-owner: *City of Olney v. Wharf*, 115 Ill. 519; 56 Am. Rep. 172.

JONES v. STATE.

[66 MISSISSIPPI, 380.]

CRIMINAL LAW — TWO OFFENSES COMMITTED AT SAME TIME — CONVICTION OF ONE NOT A BAR TO PROSECUTION FOR THE OTHER. — If one, while engaged in a difficulty with two, unlawfully strikes both, he is subject to conviction for each offense, and a conviction for one is not a bar to a prosecution for the other.

CRIMINAL LAW — ACQUITTAL WHEN NOT A BAR. — If a party, engaged in a fight with two, lawfully strikes one, but unlawfully strikes the other, an acquittal on the charge of striking the one lawfully struck will not bar a prosecution for unlawfully striking the other.

CRIMINAL LAW — EVIDENCE OF ACQUITTAL WHEN INADMISSIBLE. — Where a party has engaged in a fight with two, and when prosecuted for an assault upon one, the issue is confined to the independent act of that assault, the defendant cannot introduce the record of a trial and acquittal on a charge of assault against the other to justify his assault in the present case.

CRIMINAL LAW. — ACT LAWFUL IN ITSELF cannot be made the foundation of a criminal prosecution because of its consequences; but an act otherwise lawful may become criminal because of the circumstances under which it is done, as firing a gun in a populous city.

CRIMINAL LAW. — RECORD OF CONVICTION OR ACQUITTAL of an assault with intent to kill is a bar to a prosecution for assault and battery, or assault, growing out of the same difficulty.

CRIMINAL LAW — EVIDENCE OF ACQUITTAL. — Where one has engaged in a fight with two, and it is sought to convict him for an assault upon one, on the ground that he struck him believing him to be the other, the defendant may secure his acquittal by introducing in evidence the record of an acquittal on a charge of assaulting such other.

EVIDENCE INCOMPETENT WHEN OFFERED MAY BE MADE COMPETENT by the subsequent act of the state by its instructions changing the theory of its prosecution.

INDICTMENT against Jones for assault and battery with intent to kill. Conviction of simple assault. The remaining facts are stated in the opinion.

J. R. Dinsmore and J. E. Madison, for the appellant.

T. M. Miller, attorney-general, for the state.

COOPER, J. If the defendant, while engaged in a difficulty with Lloyd and Thomas, unlawfully struck each of his adversaries, he was subject to conviction for each offense, and a conviction for one would not bar a conviction for the other. So, also, if, while engaged in a difficulty with Lloyd, he lawfully struck him, but in the same fight also unlawfully struck Thomas, an acquittal of the charge preferred against him for striking Lloyd would not protect him from a prosecution for the unlawful striking of Thomas: *Teat v. State*, 53 Miss. 439; 24 Am. Rep. 708.

So long, therefore, as the state, in the prosecution of the indictment against the accused for the assault upon Thomas, confined the issue to the independent act of that assault, it was incompetent for the defendant to introduce in evidence the record of the proceedings in the indictment against him for the assault upon Lloyd, upon which he had been acquitted. The acquittal was not a bar to the second prosecution, nor was it competent evidence to prove that assault and battery on Thomas was justifiable.

But by the eighth instruction asked and obtained by the state, the jury was told that if the defendant, while engaged in a fight with Lloyd, struck Thomas, believing him to be Lloyd, and that Thomas was at the time doing no act to justify the battery, then the defendant was guilty of an assault and battery on Thomas, and the jury should so find. Ordinarily, the instruction would be a correct announcement of the law. If A, intending to strike B, misses him, and strikes C, or if, mistaking C for B, he strikes him, he is in either case guilty of an assault and battery on C. But this is because the act of striking is unlawful, and A would have been guilty of a battery in either instance, if he had in fact struck B, and not C.

An act, however, which is lawful in itself cannot be made the foundation of a criminal prosecution because of its consequences. There may be instances in which an act otherwise lawful may be criminal because of the circumstances under which it is done. One may fire a gun in a wilderness, and if by chance another is there and is injured, the actor is not guilty of any crime; but if the gun be fired in a populous town, the carelessness, negligence, or recklessness of the act makes it unlawful, and subjects the actor to punishment; but in such case, the act itself is unlawful.

The accused had been indicted, tried, and acquitted for an assault and battery upon Lloyd with a deadly weapon, with intent to kill and murder him. Under that indictment, he might have been convicted of the offense charged, or of an assault and battery, or of a simple assault: *Wood v. State*, 64 Miss. 761.

And under such circumstances, an acquittal under the indictment for the principal offense bars a subsequent prosecution for any of its ingredient offenses: *Moore v. State*, 59 Miss. 25.

The record of his former acquittal under the indictment for

the felonious assault upon Lloyd was conclusive evidence of the fact that the accused was not guilty of any offense by reason of any assault, or assault and battery, upon Lloyd: *Crum v. Wilson*, 61 Miss. 233. If the force directed against Lloyd was not unlawful, there was no assault or battery: 2 Bishop on Criminal Law, sec. 37.

The evidence is of a fight at night between Lloyd and the accused, in which Thomas, according to the state's theory, intervened as a peacemaker, but according to the evidence for the defendant, he took part in the fight against the defendant. Under the circumstances disclosed by the record, whether the state's evidence or that of the defendant be accepted as true, the defendant, having, by the verdict in the first indictment, been justified in what he did as against Lloyd, is protected against a conviction based upon any violence used against Lloyd, or against another whom he injured believing him to be Lloyd.

The case presents the first instance of which we are informed in which evidence incompetent when offered is made competent by the subsequent act of the state by its instructions. It would be a failure of justice if the state should be permitted to exclude such evidence as incompetent, upon the theory that it was proceeding against him for an independent act, and then, having succeeded in excluding the testimony, to abandon its position, and secure a conviction upon facts which the proffered testimony would have conclusively disproved.

The judgment is reversed, and cause remanded.

CRIMINAL LAW — FORMER ACQUITTAL OR CONVICTION. — When the same act constitutes two or more distinct offenses, each crime is separately indictable, and a conviction or acquittal in one is not a bar to prosecution in the others: Note to *Roberts v. State*, 58 Am. Dec. 540, 541; *Teat v. State*, 53 Miss. 439; 24 Am. Rep. 708; but see *Clem v. State*, 42 Ind. 420; 13 Am. Rep. 369; *Quitman v. State*, 1 Tex. App. 47; 23 Am. Rep. 396; *Hudson v. State*, 9 Tex. App. 151; 35 Am. Rep. 732.

MISSISSIPPI AND TENNESSEE R. R. Co. v. HARRISON.

[66 MISSISSIPPI, 419.]

RAILROADS — LIABILITY OF, FOR INJURIES CAUSED BY ACT OF FELLOW-PASSENGER. — A passenger cannot recover for personal injuries received in attempting to alight from a train which was moving away from his station without having stopped long enough to allow him to get off, when he knew before attempting to alight that the movement of the train was caused by the unauthorized act of a fellow-passenger in so pulling the bell-cord as to signal the engineer to start.

ACTION for damages for personal injuries received while alighting from a train at a railroad station where the appellee desired to stop. When the train arrived at such station, its name was announced, and the appellee and her escort arose to leave the train, when she met an acquaintance and fellow-passenger, a Mr. Bull, who asked her if she was going to get off, and when she answered yes, he pulled the bell-cord, supposing that he gave the signal to stop, but instead, the signal given was to start, and in consequence the train moved away without giving appellee an opportunity to alight in safety. She told Bull not to pull the bell-cord, as she desired to get off the train. She recovered judgment, hence this appeal.

W. P. and J. B. Harris, for the appellant.

W. C. McLean, for the appellee.

COOPER, J. We confine our attention to a single one of the errors assigned.

The tenth instruction given on behalf of appellee should have been refused. By it negligence was imputed to the defendant for the moving of the train, though the movement was caused by the unauthorized act of Bull, a passenger, in pulling the bell-cord, on the ground that the train had not remained at the station sufficiently long to enable the plaintiff to get off. If while the plaintiff was in the act of getting off the train, a stranger had given the signal to start, and the engineer had put the train in motion, and the plaintiff had been injured by the sudden and unanticipated movement, or if the plaintiff, perceiving that the train was in motion, and believing it to be departing from the station under the orders of the servants of the defendant, for that reason attempted to debark to prevent being taken beyond the station, the principle invoked by the instruction might have been applicable. But such were not the facts. The plaintiff testified as a witness in her own behalf, and stated that she saw Bull in the act of pulling the

bell-rope, and remonstrated with him. The instruction omits any reference to this knowledge by the plaintiff of what caused the train to move, and assumes that the liability of the company would be the same whether the plaintiff was ignorant or knew the cause of the premature movement from the station.

Two inquiries were involved in the issue: 1. Whether the injury to the plaintiff was caused by the negligent act of the defendant; and 2. Whether the plaintiff contributed to the injury by her negligent act. The verdict of the jury absolved the plaintiff from negligence. It is not necessary to now decide whether on this phase of the case it should be upheld. Practically the jury was told that the negligence of the defendant was established if the train moved away from the station without having remained a reasonable time, even though the movement was caused by the act of Bull, notwithstanding the plaintiff knew the cause of the moving. The movement of the train was not, of course, *per se* negligence. It is the business of trains to move. The plaintiff and other passengers were on it because of its capacity to move and its duty to move. The circumstances under which it was moved must determine whether it was or was not negligent. What would make the movement a negligent one as to the plaintiff must be determined with reference to her surroundings, her knowledge, and her rights. Unquestionably it was the duty of the defendant to give to her an opportunity safely to alight at her destination. But good faith is required of a passenger to the railroad equally with the requirement of careful service from the road to the passenger. The plaintiff here knew that the act which set the train in motion was not the voluntary act of its managers in the usual course of travel. She saw the passenger Bull pull the rope, and recognized the fact that it would put the train in motion. Knowing that the movement of the train was the act of the passenger, and not that of the company, she ought not to have acted with reference to it as the act of the company. It was not, as she must have known, a departure of the train from the station, and knowing that fact, she ought not to have acted as though it was. It must be assumed that the defendant would have performed its duty by returning the train to the station and affording plaintiff an opportunity to safely alight as soon as the conductor in charge learned of the cause of its departure. The plaintiff, under the circumstances of this case, ought no more to be permitted to say

that the movement of the train was a departure from the depot than she could have done if it had been set in motion by a sudden wind, and the cause had been known to her. The movement is as accidental in the one case as the other, and though the defendant might be liable in either case if the accident caused injury and could have been avoided, it does not follow that the negligence of a premature departure from the station could in either case be declared, so as to enable one knowing the facts to recover on that ground. Even though the act of the plaintiff was not negligent, she should fail of recovery under the facts named in the tenth instruction, added to the undisputed fact that she knew why the train moved off.

Reversed and remanded.

CARRIERS OF PASSENGERS. — The rule that there is a legal presumption of negligence on the part of the carrier, where an injury is caused by want of due diligence on the part of those employed by the carrier, applies also to the misconduct of passengers upon a train, as well as to the equipment and management of the train, which may result in danger or injury to fellow-passengers: *Pittsburg etc. R. R. Co. v. Pillow*, 79 Pa. St. 510; 18 Am. Rep. 424, and note 427.

SMOKEY v. PETERS-CALHOUN COMPANY.

[66 MISSISSIPPI, 471.]


SHERIFFS — DUTY AS TO ATTACHED PROPERTY. — A sheriff, after he has seized property under attachment, must take care of it; and if he fails to do so, he and his sureties are liable therefor; but a bond of indemnity neither increases nor lessens liability in this respect.

SHERIFF. — LIABILITY OF SURETIES ON INDEMNIFYING BOND does not depend upon the negligence or misconduct of the sheriff in keeping attached property. Their only liability is for the consequences resulting from the lawful discharge of the sheriff's duty in seizing the property and appropriating it to the payment of the attaching creditor's debts.

ATTACHMENT — DUTY OF THIRD PARTY TO CLAIM HIS GOODS. — A third party, whose goods are intermixed with defendant's when the whole are attached, and who claims the whole stock of goods, but fails to point out or give notice to the sheriff of what particular portion belongs to him until the trial of the issue, is not entitled to damages for his part of the goods seized and held by the sheriff.

ATTACHMENT — INDEMNIFYING BOND — DEFENSE OF SURETIES. — Whatever would be a good defense for a sheriff if no indemnifying bond in attachment had been given, is a good defense for those who, by such bond, have assumed his liability.

SUIT upon an indemnifying bond. The goods in dispute were seized under attachment against Mrs. Mary Smokey.



When the sheriff undertook to attach the goods, he found them in the possession of Frank Smokey, the appellant, whose goods were intermixed with those of defendant in attachment. He claimed the whole stock of goods; and as he failed to point out the goods belonging to such defendant, the whole stock of goods was removed by the officer, and kept until the trial of the claimant's issue, when, for the first time, he admitted that part of the goods belonged to defendant in attachment. These were then subjected to the demand of plaintiff in the attachment, and the remainder was given to the claimant. He now brings this suit to recover damages from the appellees as parties to an indemnifying bond given the sheriff at the time of the levy of the attachment, claiming that his portion of the goods has depreciated in value, from dampness and want of proper care while in the hands of the officer. Judgment for defendants, and plaintiff appeals.

James G. Leach, and Hooker and Hooker, for the appellant.

Calhoun and Green, Martin and Lannan, and T. Otis Baker, for the appellees.

ARNOLD, C. J. It was the duty of the sheriff, after the property had been seized under the writ of attachment, to take care of it; and if he failed to do so, he and the sureties on his official bond were liable therefor to the party injured: *Commonwealth v. Cole*, 46 Am. Dec. 515; Waples on Attachment, 279, 280. The bond of indemnity neither increased nor lessened his obligations in this respect: *James v. Thompson*, 12 La. Ann. 174.

The sureties on the indemnifying bond were not liable for the negligence or misconduct of the sheriff in keeping the property. Their only liability was from the consequences that might result from the lawful discharge of the sheriff's duty in seizing the property and appropriating it to the payment of the attaching creditors' debt: Murfree on Official Bonds, sec. 788; *Boynton v. Morrill*, 111 Mass. 4; *O'Donohue v. Simmons*, 31 Hun, 267.

The goods claimed by appellant having been levied on under the writ of attachment as part of a stock of goods intermixed with those of the defendant in the attachment, and appellant having claimed the whole of the stock, instead of pointing out and giving notice to the sheriff of what particular part of it belonged to him, he is not entitled to recover damages for his part of the goods having been seized and held by

the sheriff, until they were, for the first time, designated as belonging to him, on the trial of the claimant's issue.

It was the duty of the sheriff to levy on the goods of the defendant in attachment, notwithstanding they were intermixed with those of appellant, and he had a right, and it was his duty, to take and keep the whole until appellant identified his part of the stock, and demanded that it should be delivered to him. The sheriff cannot be treated as a trespasser for doing what he had a right to do; and whatever would be a good defense to him if no indemnifying bond had been taken is a good defense to those who, by such bond, assumed his liability: *Drake on Attachment*, sec. 199; *Lewis v. Whittemore*, 5 N. H. 364; 22 Am. Rep. 466; *Wilson v. Lane*, 33 N. H. 466; *Shumway v. Rutter*, 8 Pick. 443; 19 Am. Dec. 340; *Yates v. Wormell*, 60 Me. 495; *Moore v. Allen*, 25 Miss. 363; *Overby v. McGee*, 63 Am. Dec. 49.

Affirmed.

ATTACHED PROPERTY, DUTY OF THE SHERIFF WITH RESPECT TO. — "Due diligence" required of an officer in taking care of property attached under process *in rem* is such diligence as a careful, prudent man, of reasonable sense and judgment, might reasonably be expected to take if the property belonged to himself: *Jones v. McGuirk*, 51 Ill. 382; 99 Am. Dec. 556; and see note to *Abbott v. Kimball*, 47 Am. Dec. 711, as to the failure of a sheriff to take proper care of attached property.

OFFICIAL BONDS OF SHERIFFS. — What are breaches of, and the liability of sureties therefor: Extended note to *Commonwealth v. Cole*, 46 Am. Dec. 509-517.

ATTACHMENT. — Where the debtor's goods are mixed with the goods of a third person, although without such person's knowledge, the sheriff may attach the whole mixture, and hold the same until the third party identifies his portion and claims a redelivery thereof: *Bond v. Ward*, 7 Mass. 123; 5 Am. Dec. 28, and note. Compare *Lawrence v. Burnham*, 4 Nev. 361; 97 Am. Dec. 540.

TUTEUR v. CHASE AND COMPANY.

[66 MISSISSIPPI, 476.]

NOTICE. — **MERE SUSPICION IS NOT NOTICE OF FRAUD;** hence suspicion by a purchaser that the seller intends to defraud his creditors by a sale is not sufficient to put such purchaser on inquiry, or to vitiate a purchase made by him.

FRAUD — PURCHASER NOT AFFECTED BY FRAUD OF SELLER UNLESS A PARTY TO IT. — Though a sale may be made to defraud creditors, the purchaser is not affected by it, unless he bought with intent to aid the fraudulent design of the seller, or had notice of it, or knowledge of such facts and circumstances as would lead a reasonable man to conclude that fraud in fact existed or was intended by the seller.

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FRAUD CANNOT BE FOUNDED ON MERE SUSPICION. It will not be presumed, but must be proved. Hence the mere suspicion of the jury that it was the intent of a seller to defraud creditors in making a sale will not warrant them in finding that the purchaser did not act in good faith.

ATTACHMENT. Chase & Co. were creditors of one Richards, who sold his entire stock of goods to Tuteur for an alleged valuable consideration. While such goods were in the latter's possession, Chase & Co. attached the goods as against Richards. Tuteur interposed a claim for the goods, but judgment was rendered against him, and he appeals. The instruction refused was as follows: "Mere suspicion was not enough to put A. Tuteur upon inquiry before he purchased the stock of goods from Richards; and if the evidence merely excited suspicion in your minds that Tuteur was not a purchaser in good faith for valuable consideration of the stock from Richards, you will find for the defendant, A. Tuteur."

Calhoon and Green, for the appellant.

Smith and Powell, for the appellees.

ARNOLD, C. J. The thirteenth instruction asked by appellant should have been given. Its refusal seems to rest upon the assumption that the cause might be decided against the claimant on mere suspicions of fraud. This was error. Mere suspicion on the part of Tuteur that Richards intended to defraud his creditors was not sufficient to put Tuteur on inquiry, or to vitiate the purchase made by him. Suspicion is not knowledge or proof, nor is it necessarily founded on evidence. It is defined by Webster to be the act of suspecting; the imagination of the existence of something without proof, or upon very slight evidence, or upon no evidence at all. Mere suspicion, without any well-founded ground for belief, is not notice of fraud, nor is it a cause for disturbing or invalidating the transactions of life.

It does not matter how fraudulently Richards may have acted toward his creditors, Tuteur is not affected by it, unless he purchased with intent to aid him in carrying out the fraudulent design, or had knowledge of it, or, what is the same thing, notice of such facts or circumstances as would lead a reasonable man to the conclusion that fraud in fact existed or was intended by Richards: *Wait on Fraudulent Conveyances*, secs. 5, 6, 283; *Farmers' Bank v. Douglass*, 11 Smedes & M. 469; *Loughridge v. Bowland*, 52 Miss. 546; *Simms v. Morse*,

4 Hughes, 579; *Erb v. Cole*, 31 Ark. 554; *Jaeger v. Kelley*, 52 N. Y. 274; *Grant v. First Nat. Bank*, 97 U. S. 80.

Nor would mere suspicion on the part of the jury warrant them in finding that Tuteur was not a *bona fide* purchaser. Fraud is not presumed, but it must be distinctly and satisfactorily proved, either directly or by facts or circumstances from which it may reasonably be inferred: Authorities *supra*; and *White v. Trotter*, 14 Smedes & M. 30; 53 Am. Dec. 112; *Pratt v. Pratt*, 96 Ill. 184; *Shultz v. Hoagland*, 85 N. Y. 464.

Reversed and remanded.

FRAUD IS NEVER PRESUMED, but when alleged must be established by clear proof: *McCarthy v. White*, 21 Cal. 495; 82 Am. Dec. 754; *Hempstead v. Johnston*, 18 Ark. 123; 65 Am. Dec. 458; *Booth v. Bunce*, 33 N. Y. 130; 88 Am. Dec. 372; *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Nichols v. Pat-ten*, 18 Mo. 231; 36 Am. Dec. 713; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Bartlett v. Blake*, 87 Me. 124; 58 Am. Dec. 775. And mere suspicion, leading to no certain results, will not establish fraud: *Waddingham v. Loker*, 44 Mo. 132; 100 Am. Dec. 260; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Fraser v. Passage*, 63 Mich. 551. But fraud may be established by proving circumstances which lead fairly, though not irresistibly, to the conclusion of fraud; but these circumstances need never prove fraud to a moral certainty: *Turner v. Yunker*, 76 Iowa, 258; and in *Schmick v. Noel*, 72 Tex. 1, a charge to the jury that "fraud is never presumed," etc., was held to be erroneous, as fraud is often presumed from facts given in evidence, when such facts are such as to warrant such presumption.

BOHA FIDE VENDER. — A purchaser of property sold by a debtor for the purpose of defrauding his creditors will not be affected by the fraud unless he participated therein: *Catchings v. Harcross*, 49 Ark. 20; and to avoid a sale because of fraud as to the vendor's creditors, the purchaser must have knowledge of the intention of the vendor to defraud, or have notice of such facts as will put an ordinarily prudent man upon inquiry: *Bollman v. Lucas*, 22 Neb. 796.

FIRST NATIONAL BANK OF MERIDIAN v. STRAUSS.

[66 MISSISSIPPI, 479.]

NEGOTIABLE INSTRUMENTS — RESCISSION OF DRAFT. — An indorser of a draft who deposits it with a bank, known by its officers at the time to be insolvent, may rescind and stop payment of it upon discovering the insolvency of the bank.

BANKS AND BANKING — INSOLVENT BANK — RIGHTS OF DEPOSITORS. — Where the condition of a bank is so hopelessly insolvent that one of the managing partners absconds, and the other, with equal opportunities for information concerning its condition, continues to receive deposits, it does not devolve upon depositors, seeking to rescind a sale of paper to the bank, to show that the remaining partner was privy to the flight of the

other. The fraud is sufficiently proved by showing that the circumstances were such that the remaining partner must have known of the insolvency of the bank, and that the depositor could not be paid.

NEGOTIABLE INSTRUMENTS.—RECEIVING OR ACCEPTING NEGOTIABLE PAPER before maturity as security for a pre-existing debt does not constitute the holder a purchaser for value, in Mississippi.

BANKS AND BANKING.—ONE BANK BY SENDING TO ANOTHER an indorsed draft for collection does not thereby constitute the latter a holder for value, though the sending bank is indebted to the other, and has become insolvent after the draft was sent, but the indorser and depositor of the draft, when he obtains notice of the insolvency of the forwarding bank, may stop payment, and recover the proceeds of the draft if it has been paid.

R. P. Williams, for the appellant.

Witherspoon and Witherspoon, for the appellee.

COOPER, J. Strauss, a merchant in Aberdeen, Mississippi, on the sixteenth day of March, indorsed in blank, and deposited with Gattman & Co., bankers, a draft drawn on Metzler at Meridian, receiving credit on his pass-book for the amount of the same, less the fee for collection. Gattman & Co. were at that time largely insolvent, and had been for more than two years, but of this fact Strauss had no knowledge or suspicion. Gattman & Co. indorsed the draft to the First National Bank of Meridian "for collection for account." On the seventeenth day of March (Saturday) Gattman & Co. transacted business, and their doors were not thereafter opened. Strauss, learning of their failure, telegraphed Metzler not to pay the draft, and acting on this advice, he permitted it to be protested. Suit having been brought against him, he deposited the money in court, and Strauss intervened as claimant. In the court below a jury was waived, and the cause submitted to the judge, who awarded the money to Strauss, from which judgment the bank of Meridian, plaintiff, appeals.

The plaintiff contends,—1. That Strauss sold the draft to Gattman & Co., and is therefore not entitled to the money due thereon; and if mistaken in this, then that it is a *bona fide* purchaser for value, and entitled to the money to be credited on the balance of account due it from Gattman & Co.

The finding by the court in favor of the claimant includes, of necessity, the finding of the fact that the deposit was received by Gattman & Co. under such circumstances as to warrant the claimant in rescinding the transfer of the draft for fraud, and on the facts disclosed we concur in the conclusion so reached by the court.

Gattman & Co. were at the time irretrievably insolvent; the bank had been really insolvent for years, and at the time of the deposit by the claimant, one of its members had absconded; the concern was tottering to fall, and it is inconceivable that the managing partners who remained in charge were not informed of its hopeless condition. The interval is as broad in law as in morals that separates the condition of him who, though involved in financial straits, has a *bona fide* hope or expectation of retrieving his situation, and prosecutes his business for the honest purpose of so doing, from that of him who, financially destroyed, conceals his own ruin, and recklessly and fraudulently plunders the unwary and trusting who may be drawn into his toils.

Where the condition of a bank is so hopelessly insolvent that one of the managing partners absconds, and the other, with equal opportunities for information touching its condition, continues to receive deposits, it does not devolve upon depositors, seeking to rescind a sale of paper to the bank, to show that the remaining partner was privy to the flight of the other. The fraud may be sufficiently proved by showing that the circumstances were such that the managing partner must have known the hopeless condition of the bank, and that in the course of business the sum credited to the depositor could not be paid.

The Bank of Meridian was not a purchaser of the draft, and is not entitled to its proceeds to be credited on the debt due to it by Gattman & Co.

In *Bank of Metropolis v. New England Bank*, 1 How. 234, it was decided by the supreme court of the United States that where the collecting bank has no notice that the remitting bank is not the owner of the paper remitted, and, upon the credit of such remittances made or anticipated in the usual course of business between them, balances are from time to time suffered to remain in favor of the remitting bank, to be met by the proceeds of such paper, then the collecting bank is entitled, even as against the real owner, to retain the proceeds of such paper for the balance of account due it by the remitting bank.

In New York the contrary rule is announced: *McBride v. Farmers' Bank*, 26 N. Y. 454; *Dickerson v. Wason*, 47 Id. 439; 7 Am. Rep. 455. As is pointed out by Mr. Daniels (*Daniels on Negotiable Instruments*, 336 et seq.), the difference in decisions springs from the fact that in one case the collecting

bank is held to be a *bona fide* purchaser for value, while in New York, receiving negotiable paper in payment of or as security for an antecedent debt does not constitute the receiver a purchaser for value. In this state it is well settled that receiving property merely as security for a pre-existing debt does not constitute the holder a purchaser for value: *Harney v. Pack*, 4 Smedes & M. 255; *Pope v. Pope*, 40 Miss. 517; *Perkins v. Swank*, 43 Miss. 349; *Hinds v. Pugh*, 48 Id. 268; *Brooks v. Whitson*, 7 Smedes & M. 513. Otherwise, if the thing be taken in discharge of the debt, or if other security be surrendered in consideration thereof: *Love v. Taylor*, 26 Miss. 567; *Emanuel v. White*, 34 Id. 56; 69 Am. Dec. 385; *Upshaw v. Hargrove*, 6 Smedes & M. 286; *Bank of Manchester v. Lewis*, 18 Id. 226. So, also, an agreement to forbear suit for a definite time: *Turner v. Brown*, 8 Id. 425. But a mere forbearance, in the absence of any obligatory agreement therefor, is no consideration: *Brown v. Proffit*, 53 Miss. 649; *Keirn v. Andrews*, 59 Id. 39.

It is said that the great weight of authority in the United States and in England is, that one who accepts negotiable paper before maturity, as security merely for a pre-existing debt, is a holder for value, but that there is some diversity of opinion even among the English courts. The authorities are collected by Mr. Randolph in his work on commercial paper, volume 2, page 26.

The reason of the rule declaring such holders to be holders for value is the sanctity of negotiable paper and the policy of leaving it unfettered in commercial transactions. But it can find no application in this state, where by express legislative provision negotiability (in the sense in which the word is used in the law merchant) is withdrawn from all bills of exchange and promissory notes, except those payable to bearer.

As to all bills and notes (other than those payable to bearer), it is provided that "the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and sets-off made, had, or possessed against the same, previous to notice of the assignment, in the same manner as though the suit had been brought by the payee."

It is true, this has relation only to defenses existing as between the parties to the instrument and in reference to its consideration or payment, or sets-off against it; but the effect of the law is to so thoroughly deprive such paper of its ordinary

character in the law merchant as to render inapplicable a principle that springs from such character alone. We are therefore of opinion that the bank of Meridian was not the holder of the draft for value, and that its possession did not preclude the claimant from rescinding its sale to Gattman & Co. for fraud.

The judgment is therefore affirmed.

RIGHT OF CORRESPONDENT BANK TO HOLD PAPER RECEIVED FOR COLLECTION, OR THE PROCEEDS OF IT, AS AGAINST THE OWNER, IN CASE OF THE INSOLVENCY OF THE FORWARDING BANK. — The rule adopted in the principal case is based on a statute which provides that receiving property merely as security for a pre-existing debt does not constitute the holder a purchaser for value. Independent of statutory provision, this case finds support in other cases decided by the courts of New York, Pennsylvania, and Connecticut. The courts of other states, differing in this respect from those named, have determined that an existing debt is a sufficient consideration for the transfer of collateral security, and constitutes the creditor a holder for value, regardless of equities. Among the large number of cases applying this rule to commercial paper are the following: *Straughan v. Fairchild*, 80 Ind. 598; *Brooklyn etc. R. R. Co. v. National Bank*, 102 U. S. 14; *Swift v. Tyson*, 16 Pet. 1; *Atkinson v. Brooks*, 26 Vt. 569; 62 Am. Dec. 592; *Fisher v. Fisher*, 98 Mass. 303; *Maitland v. Citizens' National Bank*, 40 Md. 540; 17 Am. Rep. 620; *Roberts v. Hall*, 37 Conn. 205; 9 Am. Rep. 308; *Bank of Republic v. Carrington*, 5 R. I. 515; 73 Am. Dec. 83; *Mix v. National Bank*, 91 Ill. 20; 33 Am. Rep. 44; *Robinson v. Smith*, 14 Cal. 94; *Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647; *Sackett v. Johnson*, 54 Cal. 107; *Boatman's Savings Institute v. Holland*, 38 Mo. 49; *Armour v. McMichael*, 36 N. J. L. 92. It therefore appears to us that the better rule is, that where commercial paper is simply indorsed and deposited in a bank for collection, but not so marked, and the depositary forwards it to a correspondent bank, which receives it without notice of the true ownership, and either advances money to the depositary, or receives it in suspension or payment of an existing debt, or suffers balances to remain against the depositary, on the credit of the paper transmitted or believed to be transmitted in the usual course of business between the banks, such paper or its proceeds ought not to be recovered from the correspondent bank by the owner in case of insolvency of the depositary before the transaction is fully completed. In such a case the correspondent ought to be considered a holder for value. Otherwise great injury may be done it, if it transpires that the paper does not belong to the depositary. The loss ought to be sustained by the party who allowed the paper to go forth with the appearance that it was the property of the depositary, and not by the correspondent, who received it on the faith of what it purported to be on its face. The indorser or depositor could obviate the whole difficulty by simply adding to his indorsement the words "for collection," and unless he does so, he ought to bear the loss. The effect of the addition of these words will be shown later on.

The doctrine above laid down has for its foundation the case of *Bank of Metropolis v. New England Bank*, 1 How. 234; 6 Id. 212. Upon facts almost identical with those in the principal case, the supreme court of the United States held, in the cases above cited, that where there have been mutual and extensive dealings between two banks, and an account current kept between

them, in which they mutually credited each other with the proceeds of all paper remitted between them for collection when received, and accounts were regularly transmitted from one to the other, and settled upon these principles, and the paper transmitted always appeared upon its face to be the property of the bank sending it, and to be remitted by each of the banks upon its own account, there is a lien for a general balance of account upon any and all such paper thus transmitted in favor of the collecting bank, no matter who may be the true owner, and notwithstanding the insolvency of the forwarding bank before the proceeds of the paper transmitted reaches the hands of the depositor. The correctness of this rule was reaffirmed in *Sweeney v. Easter*, 1 Wall. 166; and the cases from Howard, *supra*, were commented upon and followed in *Wyman v. Colorado Nat. Bank*, 5 Col. 20, 40 Am. Rep. 132, as well as in *Miliken v. Shapleigh*, 36 Mo. 596; 88 Am. Dec. 171. In such cases, upon the insolvency of the forwarding bank, the collecting bank may retain the proceeds of paper received for collection indorsed in blank, and purporting to be the property of the forwarding bank, if after collection, and without making actual payment, the correspondent has merely given credit to the depository, or suffered balances to its own credit to remain undrawn with the forwarding bank on the strength of remittances of this kind made from time to time in the usual course of business. In such cases, it is proper that the owner of the paper, who, through his negligence in thus indorsing the paper in blank, and permitting the transmitting bank to appear as the true owner, has led the collecting bank to be deceived and misled, should bear the loss, as being the more negligent of the parties interested: *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Miller v. Farmers' etc. Bank*, 30 Id. 392. In *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366, it appeared that the owner of a negotiable note indorsed in blank by the payee handed it to an attorney at law for collection. He deposited it in a bank for collection, without mentioning for whose account. The bank collected it, and credited it to the attorney, and applied the proceeds to the part payment of a debt which he owed the bank. The attorney was subsequently adjudged bankrupt, and the bank settled with his assignees, including the amount of the note thus collected. The owner of the note, upon ascertaining that the bank had collected it, made a demand upon it for the proceeds; but it was held, under the above rule, that he could not maintain an action for such proceeds against the bank. A firm had been in the habit of indorsing in blank commercial paper drawn to its order, and of depositing it in a bank as so much money to be drawn against, and they so deposited a check indorsed in blank, without any instructions, and the receiving bank sent it for collection to the bank on which it was drawn, and at the same time sent a large draft for the depositor's benefit. The second bank sent the draft for collection; the first bank suspended payment, and the depositor telegraphed to stop payment of the draft. This was done, and the second bank, when it received the draft again, refused on demand to surrender it to the depositor. He brought suit for it, but the court held that defendant was entitled to regard the paper as the property of the forwarding bank, and that an action, therefore, would not lie against the collecting bank: *Cody v. City Nat. Bank*, 55 Mich. 379. So in the subsequent case of *Edson v. Angell*, 58 Id. 336, it was held that a draft deposited in a bank without instructions should be treated as a separate fund, and if forwarded by that bank to its correspondent for collection, and deposited to its credit, and if the fund in the collecting bank is daily changing by reason of drafts and deposits, so that no particular money can be identified, the original depositor cannot, on the

failure of the first bank, reclaim the entire amount of his draft from the funds in the correspondent bank to its credit. In such case, he can recover only his *pro rata* share, the same as any other creditor.

This doctrine has lately met with reapproval in the United States courts, in the case of *Vickrey v. State Savings Ass'n*, 21 Fed. Rep. 773, where it is held that if a negotiable instrument is delivered indorsed in blank to a bank, though only for collection, and is by it sent to another bank for collection before maturity, and if the latter takes it without notice that it is not the property of the former, it may retain the proceeds of the collection to satisfy a claim for a general balance against the first bank, if such balance has been allowed to arise and remain on the faith of receiving payments from such collections, in accordance with a usage existing between the two banks.

On the other hand, as before mentioned, a contrary rule is maintained in New York, where the collecting bank is not considered a holder for value by reason of its having a balance against the remitting bank for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsement, in reliance upon a course of dealing between the banks to collect notes for each other, each keeping an open account of such collections, treating all paper sent for collection as the property of the other, and drawing for balances at pleasure. In other words, the title to commercial paper, received by one engaged in the business of banking and collecting, indorsed in blank to him by the depositor, and forwarded by him to his correspondent bank for collection in the usual course of business, without any express agreement, does not become vested in the correspondent, although he may have remitted upon general account in anticipation of collections; and, in such cases, he cannot retain the paper or its proceeds as against the owner: *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dickerson v. Wason*, 47 Id. 439; 7 Am. Rep. 455. The same rule prevails in Connecticut: *Lawrence v. Stonington Bank*, 6 Conn. 521; and, in effect, in Pennsylvania, where it is held that when a bank sends the draft or note of its depositor to another bank for collection, the collecting bank cannot, on failure of its correspondent, without having made advances or given new credit on the faith of the paper, credit the proceeds of the collection to its account, but it is liable to the owner of paper for such proceeds: *First Nat. Bank v. Greeg*, 79 Pa. St. 384; *Jones v. Milliken*, 41 Id. 252; *Hackett v. Reynolds*, 114 Id. 328. In the latter case it is said: "We cannot consent to the doctrine that a mere usage and course of dealing between banks in the transacting of bills and notes for collection, by which they mutually credit the avails in account to overbalances due, can, without more, deprive a third person, the real owner of the notes and bills, of his rights."

In all cases of this nature, all dispute and difficulty is avoided where the depositor, in indorsing the paper, adds the words "for collection." The effect of these words added to the indorsement is to limit it, and to warn subsequent receivers for collection that the purpose of the indorsement is not to transfer the ownership of the paper or its proceeds. An indorsement thus made is not intended nor understood to give currency or circulation to the paper. It has an effect exactly the reverse, namely, it prevents further circulation, and limits the authority of the holder to the act of collection for the benefit of the indorser; and in case of the insolvency of the forwarding bank, such an indorser can either recover his paper, or its proceeds if it has been collected: *Central R. R. v. First Nat. Bank*, 73 Ga. 383; *Sweeny v. Easter*, 1 Wall. 168; *White v. Miners' Nat. Bank*, 102 U. S. 658; *Merchants' Nat. Bank v. Hunson*, 33 Minn. 40; 53 Am. Rep. 5; *Cecil Bank v. Farmer*—

Bank, 22 Md. 148; *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; 40 Am. Rep. 261; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Blaine v. Borne*, 11 R. L. 119; 23 Am. Rep. 429; *Bank of Metropolis v. First Nat. Bank*, 22 Blatchf. 58; *First Nat. Bank v. Reno County Bank*, 1 McCrary, 491. This being the established doctrine in case of such restricted indorsements, the better rule, as was said in the beginning, would seem to be, that where the depositor neglects to append to his indorsement the words "for collection," and the depositary forwards the paper for collection without giving notice of the fact that it is not the owner, and then becomes insolvent, the loss ought to fall on the depositor, as the one who has enabled the depositary to impose upon the correspondent, who has received and acted upon the paper in faith of its being what upon its face it purported to be, and the latter ought, therefore, to be considered a holder for value, as against the owner, when the usual and customary dealings between the banks justifies the correspondent in acting as it did in receiving and collecting the paper.

BALTIMORE AND OHIO EXPRESS CO. v. COOPER.

[66 MISSISSIPPI, 558.]

EXPRESS COMPANIES — CONTRACT LIMITING LIABILITY. — A receipt issued by an express company for an article when received for transportation containing a condition that the company will not "be liable for any loss or damage, unless the claim therefor shall be presented in writing at this office within thirty days after this date," will not limit the liability of the company for damages in neglecting and delaying to forward an article received for transportation by the office issuing the receipt.

ACTION for damages against appellant for negligently failing to forward without delay an iron casting delivered to it for transportation. The company sought to limit its liability by its receipt, issued when the article was received for transportation, and containing the following condition: "In no event shall the express company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be annexed." Notice required by this clause was not given, nor was objection made on that account. Judgment was rendered against the company, and it appealed.

D. W. Heidelberg, for the appellant.

T. A. Wood, for the appellee.

CAMPBELL, J. The only point made by the appellant deserving special mention is, that the claim for the loss or dam-

age was not presented in writing at the office which issued the receipt, etc., in accordance with a condition contained in it; and our view is, that this condition is not applicable to this case, because the claim here sued on is for damages for negligence by that office in not sending forward the article named, and there was no necessity to bring to the notice of the company at that office the claim for what that office was fully cognizant of, its negligence having caused the loss.

Affirmed.

EXPRESS COMPANIES — THEIR LIABILITY FOR NEGLIGENCE. — Where the receipt given to the sender of an express package contained the condition that the company should be liable for no loss unless claim should be made for the same at the receiving office of the company within thirty days from date of the receipt, and the package was lost, but the sender was not informed of the non-delivery until a year had elapsed from the date of the receipt, he could recover, notwithstanding the limitation in the receipt: *Southern Express Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118; to the same effect is *Porter v. Southern Express Co.*, 4 S. C. 135, 16 Am. Rep. 762. But in *Southern Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385, it was decided that a stipulation in an express company's receipt that the company shall not be liable for any loss, unless a written claim therefor shall be made at the shipping office within thirty days from date, was a valid stipulation, and must be complied with; but such stipulation, to be enforced, must be pleaded: *Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300.

WESTBROOK v. MOBILE AND OHIO R. R. Co.

[66 MISSISSIPPI, 580.]

CONTRIBUTORY NEGLIGENCE — PRESUMPTION IN FAVOR OF INFANT. — Child four or five years of age is not, as a matter of law, chargeable with contributory negligence, and barred from recovery in an action brought by him or in his behalf for injury inflicted upon him by another, because he did not exercise reasonable care to avoid the injury.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — PRESUMPTION IN FAVOR OF INFANT. — A child of tender years is *prima facie* exempt from responsibility. If he is of exceptional maturity and capacity, or capable of taking care of himself under the circumstances, these facts must be pleaded, and then the testimony on the question of capacity left to the jury as a question of fact, and not determined by the court as a question of law.

CONTRIBUTORY NEGLIGENCE OF PARENT TOWARD CHILD. — In an action for negligent injury to an infant, brought by a parent for the latter's benefit, the contributory negligence of the parent is a bar to the action, except when the injury to the child was committed wantonly, willfully, or recklessly.

CONTRIBUTORY NEGLIGENCE OF PARENT. — Failure of parent to guard and protect his infant child from danger is negligence, and if it contribut

directly to an injury sustained by the child, the parent is guilty of contributory negligence, and cannot recover for the injury in his own behalf, except where the injury was inflicted wantonly, recklessly, or willfully; but when the action is brought by the child, or for his benefit, the negligence of the parent cannot be imputed to the child.

INFANTS HAVE LEGAL RIGHTS DISTINCT FROM THEIR PARENTS to security from personal injuries caused by the negligence or willful wrong of others; and the negligence of the parent is no excuse for the abuse or misuse of the child by another.

ACTION to recover damages against a railroad company, by plaintiff, a child four or five years old, who was struck and injured by a train while crossing the track of defendant at a well-known highway crossing, through the negligence of the brakeman of the train, who, when he saw the child on the track, failed to blow the whistle, ring the bell, stop his train, or slacken its speed. The declaration alleged these facts, and also that plaintiff resided with his father about 180 feet from the railroad track; that at the time of the injury plaintiff and an elder brother were driving stock across the track, as they were accustomed to do, and that if plaintiff had been given any warning by the engineer of the train of its approach, he would not have been injured. The declaration was demurred to in the form of special pleas, on the ground that it did not state facts sufficient to constitute a cause of action, because the injuries complained of were the direct result of plaintiff's contributory negligence, and because they were the direct result of the negligence of his parents, next friend, and elder brother, in allowing him to be upon the track. The demurrer was sustained, and plaintiff appeals.

Frank A. Critz, for the appellant.

Barry and Beckett, and E. L. Russell, for the appellee.

ARNOLD, C. J. We are unable to subscribe to the doctrine that a minor four or five years of age shall, as matter of law, be charged with contributory negligence, and barred from recovery in an action brought by him or in his behalf for an injury inflicted upon him by another, because he did not exercise reasonable care to avoid the injury. A child of such age is generally incapable of choosing between right and wrong,—between good and evil,—and between care and rashness. From him duties to others are not exacted, but from others to him duties are recognized and enforced.

At common law, a child under seven years of age is conclusively presumed to be without discretion, and incapable of

committing crime. And between seven and fourteen years of age he is also *prima facie* incapable of exercising judgment and discretion, but evidence is received to rebut the presumption of incapacity: 1 Bishop's Crim. Law, sec. 368; 1 Wharton's Crim. Law, sec. 58.

The rule which exempts a child of tender years from responsibility, while it may not operate justly in every possible case, on the whole promotes the ends of justice, and we follow the authorities which hold that a child of the age of appellant is *prima facie* exempt from responsibility, but that testimony is admissible to show the contrary, and that the question of capacity in such case is one of fact for the jury, and not one of law to be determined by the court: *Washington etc. R. R. Co. v. Gladman*, 15 Wall. 401; *Sioux City R. R. Co. v. Stout*, 17 Id. 657; 1 Thompson on Negligence, 452, note 6; 2 Id. 1182.

If appellant was of exceptional maturity and capacity for one of his age, or capable of taking care of himself under the circumstances, these facts should have been pleaded, or notice given of them under the general issue, according to the statute. As the second plea fell short of this requirement, the demurrer to it should have been sustained.

The third plea constituted no defense to the action. When an action for the negligent injury of an infant is brought by the parent for the parent's own benefit, it may justly be held that the contributory negligence of such parent in exposing, or permitting his child to be exposed, to danger, may be shown in bar of the action, except when the injury to the child was committed wantonly, willfully, or recklessly.

It is the duty of the parent to guard and protect his infant child from danger, and this duty is more imperative in proportion to the weakness and incapacity of the child. Failure of the parent to discharge such duty is negligence, and if such negligence contributes directly or essentially to the child being injured, the parent is a concurrent wrong-doer with the party inflicting the injury, and his own negligence, with the exception above stated, would be a bar to his own suit: Beach on Contributory Negligence, sec. 44, and authorities there cited; *Pratt Coal and Iron Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 371.

But when the action is brought, as in the case at bar, by the infant, or for his benefit, the better rule is, that the negligence or misconduct of the parent or custodian of the child shall not be imputed to the child: Beach on Contributory Negligence,

sec. 43, and authorities there cited. To charge the child with the negligence of the parent or custodian, in such case, would be, as said by the supreme court of New York in *Lannen v. Albany Gas Light Co.*, 46 Barb. 264, to visit "the sins of the fathers upon the children, to an extent not contemplated by the decalogue, or in the more imperfect digests of human law."

Infants have legal rights distinct from their parents, which are carefully protected by law, and among these is the right to security from personal injuries occasioned by the negligence or willful wrong of others. Indeed, it seems that the negligence or dereliction of the parents or custodians of children, instead of being a justification for others to abuse or misuse the children, should have a contrary effect, both in law and morals.

It was well said by the supreme court of Alabama, in *Government Street R. R. Co. v. Hanlon*, 53 Ala. 70: "We know of no principle of law which will justify the denial of a child's legal rights because of the failure of the parent to extend to him the protection demanded by law. When the parent fails in this duty, there would seem to be greater reasons for extending to the child a higher degree of civil protection. If a child should be abandoned by his parents, and thrown out as a mere waif on society, it is not possible, it seems to us, that one who negligently inflicts an injury on it can be heard to invoke the parent's crime to shield him from liability for such wrong. It seems repulsive to our sense of justice that because the parent is negligent of the child others may with impunity be equally negligent of its helplessness, and equally indifferent to its necessities. The law may not compel active charity for the relief of the child, but it does shield him from positive wrong and injury."

The declaration was not demurrable. The demurrer should not have been extended back to the declaration.

The judgment is reversed, the demurrer to the second and third pleas is sustained, and the cause remanded.

NEGLIGENCE OF INFANT AS BAR TO RECOVERY FOR PERSONAL INJURIES.—The question as to whether the negligence of the parents or legal representative and custodian of a child of such tender years as to be itself incapable of negligence will be imputed to it, and thus preclude the child, in an action brought by it, its representative or next friend, from recovering damages for an injury sustained by it, has already been sufficiently treated in this series, and we pass that part of the subject with the remark that though the authorities are intensely conflicting and entirely unreconcilable, still it seems to be the better opinion, sustained by the best considered authorities, the latest, and we think the majority, of the cases, that the rule is now

established that in an action by the infant for damages resulting from an injury to himself by the negligence or want of care of a third party, the negligence of the parent or guardian is not to be considered or imputed to the infant: Note to *Freer v. Cameron*, 55 Am. Dec. 676, 677; *Erie City etc. R'y Co. v. Schusler*, 113 Pa. St. 412; 57 Am. Rep. 471, and note 474-479; *Street R'y Co. v. Edlie*, 43 Ohio St. 91; 54 Am. Rep. 803; *Williams v. T. & P. R. R. Co.*, 60 Tex. 205; *Bisailion v. Blood*, 64 N. H. 565; *Chicago R'y Co. v. Robinson*, 127 Ill. 9; *Pratt etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751, and note 754.

Taking it as settled, then, that the negligence of the parent is not to be imputed to the child, it remains to state, if possible, the age at which the child will be held guilty of contributory negligence so as to bar it from recovery for an injury received at the hands of another, and in this respect great difficulty is encountered from the diversity of facts arising in each particular case, and from the difference of opinion expressed by the courts as to when the child is to be regarded as capable of exercising some degree of care and diligence for its protection. Perhaps the best and only general rule which can be deduced from the authorities is that laid down in *Pratt etc. Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751, where it is said that "when the infant sues for his own benefit, the application of the doctrine of contributory negligence depends on the capability of the plaintiff to exercise judgment and discretion. If the plaintiff is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing a duty to another, neither contributory negligence on his part nor that of his parent can be set up to defeat a recovery. A child between seven and fourteen years of age is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity. If capacity is shown, the general rule of contributory negligence is applicable, whether the action is prosecuted on behalf and for the benefit of the child, or by the father for his own benefit. The proof shows that the child was a few months over seven years of age, but there was no evidence tending to show the requisite capacity. In such case, the presumption of incapacity prevails."

In *Stone v. Dry Dock etc. R. R. Co.*, 115 N. Y. 104-108, it is said: "The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part, which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury. It cannot be asserted as a proposition of law that a child just past seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. In administering civil remedies, the law does not fix any arbitrary age when an infant is deemed capable of exercising judgment and discretion. From the nature of the case it is impossible to fix an exact period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury, when the inquiry is material, unless the child is of such very tender years that the court can safely decide the fact." Where the child is of such extremely tender years that it cannot be deemed capable of exercising any degree of care as to its personal safety, it will be conclusively presumed incapable of contributory negligence, and the court will so declare the law. This doctrine has been applied in cases where the age of the child ranged from one year and five months to

seven years of age: See the cases cited in the note to *Freer v. Cameron*, 55 Am. Dec. 676; *Farris v. Cass Ave. etc. R'y Co.*, 80 Mo. 325; *Keyser v. Chicago etc. R'y Co.*, 56 Mich. 559; 56 Am. Rep. 405; *Philadelphia etc. R. R. Co. v. Loyer*, 112 Pa. St. 414; *Mackey v. City of Vicksburg*, 64 Miss. 777; *Chicago etc. R. R. Co. v. Welsh*, 118 Ill. 572; *Gulline v. City of Lowell*, 144 Mass. 491; *Gavin v. City of Chicago*, 97 Ill. 66; 37 Am. Rep. 99; *Bay Shore etc. R. R. Co. v. Harris*, 67 Ala. 6; *McGeary v. East etc. R. R. Co.*, 135 Mass. 263; *Texas etc. R. R. Co. v. O'Donnell*, 58 Tex. 27; *Frick v. St. Louis etc. R. R. Co.*, 75 Mo. 542; *Erie City etc. R'y Co. v. Schuster*, 113 Pa. St. 412; 57 Am. Rep. 471. Of children between the ages of seven and fourteen years some degree of care may be justly and reasonably expected, and unless they exercise the degree of precaution required of them under the circumstances, they cannot recover, but the care and caution required of the child depends almost entirely upon his maturity and capacity, and that must be determined by the circumstances of each particular case, and it is settled by an unbroken line of authorities that a child is held, so far as he is personally concerned, only to the exercise of such degree of discretion as can reasonably be expected from children of his age: See the note to *Freer v. Cameron*, 55 Am. Dec. 676, citing numerous cases; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320, and note; *Strausbridge v. Bradford*, 128 Pa. St. 200; 15 Am. St. Rep.

Thus in *Twist v. Winona etc. R. R. Co.*, 39 Minn. 164-168, it is said: "The law very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence; but this principle cannot be applied, as a rule of law, to all children, without regard to their age or mental capacity. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger." In this case the plaintiff was a boy aged ten and one half years, of average intelligence, who had frequently been in the vicinity of a railroad turn-table, had a general knowledge of its operation, and had been repeatedly warned of the danger of playing upon it. He knew that children were prohibited from playing upon it, but while doing so was injured, and it was held that he was guilty of contributory negligence, although he might not have been of sufficient age and discretion to understand the full extent of the danger to which he exposed himself. A boy between eight and nine years of age is only required to exercise care and prudence equal to his capacity, age, knowledge, and experience: *McCarthy v. Cass Avenue etc. R'y Co.*, 92 Mo. 536. So is a boy between eleven and twelve years old: *Re-wtn v. St. Louis etc. R'y Co.*, 96 Id. 290; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320. Where a boy seven years of age has wandered upon a railroad track, without negligence on the part of his parents, and is seen by persons having charge of a train of cars, more care is required than in the case of one who has reached the age of discretion. There is no presumption that he will heed signals of danger, and the engineer is bound to stop his train if he sees that the child makes no attempt to leave the track. For his failure so to do, the railroad company is liable in damages: *Indianapolis etc. R'y Co. v. Pizer*, 109 Ind. 179. The child's capacity is always

the measure of his responsibility, and if he has not the ability to foresee and avoid danger, negligence will never be imputed to him. So where a child six or seven years old tried to cross a street covered by a train of cars about to start, and received an injury, it was held negligence to fail to give the child notice that the train was about to start: *Philadelphia etc. R. R. Co. v. Laver*, 112 Pa. St. 414.

Where the question of contributory negligence on the part of the child arises, the caution required is according to the maturity and capacity of the child, to be determined in each case by the facts of that case; and the degree of discretion in avoiding danger depends upon the age and knowledge of the child. If the evidence is not conflicting as to the danger incurred, or as to the act in getting in the way of such danger, or as to the age or capability of the child, or when, from all the circumstances of the case, ordinarily prudent men would not be liable to differ in their views as to whether negligence could be imputed to the child, the court will declare him not guilty of contributory negligence. Tested by this rule, children have been held not to be guilty of contributory negligence in the following cases: A child eight years of age, in crossing a railroad track: *Taylor v. Delaware etc. Canal Co.*, 113 Pa. St. 162; a boy eight and one quarter years old injured by exploding a dynamite cartridge while rightfully upon the lands of another: *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154; a boy eleven years old injured in a sugar-cane mill, where he was employed: *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; a child six years old injured in the streets of a city by the cars of a railroad company: *Galveston etc. R'y Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; a boy in his ninth year injured by an engine on a railroad track: *Kansas Pacific R'y Co. v. Whipple*, 39 Kan. 531. An extreme case under this rule is that of *Street Railway Co. v. Eadie*, 43 Ohio St. 91; 54 Am. Rep. 802. The plaintiff was a young lady aged sixteen years, lawfully riding with her father, who was driving his own team, when she was injured by a collision between her father's wagon and a street-car, through the mutual negligence of the street-car driver and her father. In *Plumley v. Btge*, 124 Mass. 57, 26 Am. Rep. 645, it was held that a boy thirteen years old might recover for an injury from the bite of a dog, if he was exercising such care as might be expected from a boy of his age and capacity.

Under the same rule, it has been held that a boy twelve years of age, and of ordinary intelligence, killed while riding on a freight train in front of an engine, was guilty of such contributory negligence as to bar recovery; and the fact that a boy of that age is more reckless and not as cautious as an adult, in the face of such danger, will not excuse him from riding as he did: *Keliff v. Wabash etc. R'y Co.*, 64 Mich. 196. So a boy eleven years of age is not of such tender years as not to be chargeable with negligence in playing and lounging upon the right of way and track of a railroad company: *Masser v. Chicago etc. R'y Co.*, 68 Iowa, 602. Where a boy in his ninth year, who, while engaged in riding upon the runners of sleighs in the public street, suddenly leaves the sleigh on which he is riding, and, without looking behind him, and while it is in motion, and in so doing is struck and injured by a sleigh following, he is guilty of such negligence as will prevent him from maintaining an action for damages: *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295; 141 Mass. 335. The same rule has been applied where boys eight and nine years old have been injured while on the track of a railroad company: *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92; *Potter v. Wilmington etc. R. R. Co.*, 92 Id. 541.

In all cases in which any doubt arises as to whether the child is *sui juris*,
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either from its age, a conflict in the evidence, or from circumstances surrounding the case, it seems to be proper, and in fact a majority of the cases makes it the duty of the court, to submit the question of contributory negligence to the jury, and to leave them to determine, from the facts before them, whether the maturity and capacity of the child was such as to charge him with contributory negligence: *Straubridge v. Bradford*, 128 Pa. St. 200; 15 Am. St. Rep. Thus it was held in one case that the law fixes no certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent on those of mature age, and that, in every case, the question of the intelligence of the child is one for the jury: *Houston etc. R'y Co. v. Simpson*, 60 Tex. 103. The right of a child to cross a railroad track is accompanied by the duty to use reasonable and at least ordinary care, his age, experience, and intelligence being taken into consideration with the other circumstances existing at the time of his injury. If, after a proper consideration of these things, the jury finds that the child had sufficient intelligence and experience to know of the danger, of the signals and warnings against it, and the manner in which an injury might be produced by failure to observe such signals and warnings, they are warranted in considering the question of contributory negligence; and if they find that the accident occurred by reason of the child's failure to heed such indications of danger, his negligence will prevent his recovery; the jury bearing in mind, at the same time, that when contributory negligence is sought to be attributed to a child, he can only be held to that degree of care and caution which may reasonably be expected from one under the same conditions, of the same age, sex, intelligence, and judgment: *Baker v. Flint etc. R. R. Co.*, 68 Mich. 90; *Cassiday v. Oregon etc. Co.*, 14 Or. 551. So where a girl seven years old, of ordinary intelligence, was sent on an errand by her mother, and knocked down and injured in a gutter near a much used street crossing by being run into by defendant's team going on a run, it was held that negligence could not be imputed to the child as a question of law, but was for the jury, under all the circumstances: *Dealey v. Muller*, 149 Mass. 432. The same rule was held to apply to a child four and one half years of age injured while upon the street: *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; and to a boy twelve years of age killed while riding on a freight train in front of an engine, the circumstances being such as to make a doubtful case: *Ecliff v. Wabash etc. R'y Co.*, 64 Mich. 196; and to another boy eleven and one half years old: *Eswin v. St. Louis etc. R'y Co.*, 96 Mo. 290; and to one twelve years of age: *Williams v. Kansas City etc. R. R. Co.*, 96 Id. 275; to another seven years of age killed upon a railroad track: *Hoppe v. Chicago etc. R'y Co.*, 61 Wis. 357. In Illinois, under the rule of comparative negligence existing in that state, if the negligence of the child is slight, while that of defendant is gross, the child may recover, otherwise not. This is a question for the jury: *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198.

Upon the subject of the submission of the question of the contributory negligence of the child to the jury, the court said, in *Nagle v. Allegheny etc. R. R. Co.*, 88 Pa. St. 35-39, 32 Am. Rep. 413: "The law fixes no arbitrary rule when the immunity of childhood ceases and the responsibilities of life begin. For some purposes majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty-one years of age, and not responsible a day or a week prior thereto. At what age, then, must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury.

That would furnish us with no rule whatever. It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the court. It requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

We do not understand this case to be at all in conflict with the doctrine above announced, namely, that, in all doubtful cases, where it is sought to attribute contributory negligence to the child, his capacity to commit it is a question for the jury, to be measured by his age, intelligence, and the knowledge which might be reasonably expected of one of his years under the circumstances. The Pennsylvania case merely announces the rule that after an infant has attained the age of fourteen years, the same degree of care and vigilance is expected and required of him as would be required of an adult under the same circumstances and conditions, and this would seem a very just doctrine.

Though the child may have been a technical trespasser at the time of the accident, and thus have contributed directly to his own injury, his recovery will not be barred if, at the time, he was of tender years, and exercising all the care and caution that could be reasonably expected or required of one of his maturity and capacity. In all such cases, the defendant must be shown to have been guilty of negligence toward the child in order to enable the latter to recover. The defendant's liability exists because the natural instincts of the child have brought it into contact with the means of danger to which the negligent act of defendant has exposed it. Therefore, when this element of temptation is wanting, and the defendant has been guilty of no act calculated to attract the child into danger, an action cannot be maintained.

The rule above enunciated is deduced from what is known as the turn-table cases, in which railroad companies, under various circumstances, have been held liable, on the ground of negligence, for personal injuries to small children in towns and cities, in consequence of their own acts in meddling with railroad turn-tables, left open to public access, unfastened and unguarded, on the company's land, where they would be likely to cause injury to children, though harmless if left alone: *Railroad Company v. Stout*, 17 Wall. 657; *Keffe v. Milwaukee etc. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Kansas etc. R. R. Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203; *Evansich v. Gulf etc. R. R. Co.*, 57 Tex. 126; 44 Am. Rep. 586; *Koons v. St. Louis etc. R. R. Co.*, 65 Mo. 592; *Nagle v. Missouri etc. R. R. Co.*, 75 Mo. 653; *Williams v. Kansas City etc. R. R. Co.*, 96 Mo. 275; *A. & N. R. R. Co. v. Bailey*, 11 Neb. 332. The rule as announced in these cases has been applied by the courts in many of the states to children from five to twelve years of age, in cases arising under various circumstances, and it is well settled that where a person has upon his premises machinery, tools, implements, or property which are dangerous to children as playthings or otherwise, and in their nature affording special temptation to children to play with them, he is under obligations to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children may be trespassers. In this respect, he must exercise toward such children a degree of care, caution, skill, and vigilance not required toward adult persons: *Boland v. Mis-*

souri etc. R. R. Co., 36 Mo. 484; *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146; *Hydraulic Works v. Orr*, 83 Pa. St. 332; *Mackey v. City of Vicksburg*, 64 Miss. 777; *Cosgrove v. Ogden*, 49 N. Y. 255; *Meeks v. S. P. R. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67, and see note 72; *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154; *Branson v. Lubrot*, 81 Ky. 638; 50 Am. Rep. 193; *Wood v. School District*, 44 Iowa, 27. This rule, however, as to liability for negligence toward children who are trespassers, has been repudiated in a few cases, in which it is held that the child being a trespasser, the defendant owes no duty to him, and is not, therefore, liable for negligence in injuring him, unless such negligence is wanton and vicious: *Gilispie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365, overruling *Hydraulic Works v. Orr*, *supra*; *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258; *Morrissey v. Railroad*, 126 Mass. 377; 30 Am. Rep. 686; *Cauley v. Pittsburg etc. R. R. Co.*, 95 Pa. St. 396; 40 Am. Rep. 664, and extended note.

WHITFIELD v. CITY OF MERIDIAN.

[66 MISSISSIPPI, 570.]

MUNICIPAL CORPORATIONS — LIABILITY FOR STREETS DEFECTIVE FOR WANT OF FUNDS. — Want of funds, and an absence of power to raise money by taxation or otherwise, or to enforce contributions of labor from the residents of the town, to repair its streets will free a municipality from responsibility for injuries sustained from defective streets and sidewalks. This rule does not apply when the city charter gives extensive powers of taxation for the purpose of laying out and improving its streets and avenues.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE STREETS. — A city is not called upon to open new streets in advance of public needs, and even where a street has been accepted, a different and less degree of care may suffice for one infrequently used than for those in the heart of the city. Because a street is little used, the city cannot permit pitfalls and dangerous precipices to be made or continued in it without becoming liable in damages therefor.

MUNICIPAL CORPORATIONS — NOTICE PRESUMED OF DEFECTIVE STREET. — City must know, and repair within a reasonable time, defects in its streets. If a street has been in a dangerous condition for five or six years, it is presumed that the city knew or ought to have known of such condition, and it is liable in damages to one who is injured through such condition of the street.

MUNICIPAL CORPORATIONS — NOTICE OF DEFECTS IN STREET. — One who has sustained damage need not prove that the city had actual notice of the defect in the street which caused the damage. The circumstances of each case must determine whether constructive notice of the defect is to be attributed to the city, but where the defect is manifest, and of such dangerous character as to obtrude its existence upon a casual observer, and has existed through many years, the city is guilty of negligence and liable in damages.

ACTION for damages on account of an injury received by plaintiff at night because of a defect in the sidewalk of one of

the streets in the city. The material facts are stated in the opinion. Judgment for defendant, and plaintiff appeals.

Miller and Baskin, for the appellant.

Williams and Russell, for the appellee.

COOPER, J. We do not dissent from the proposition advanced by counsel for appellee, that a want of funds, and an absence of power to raise money by taxation or otherwise, or to enforce contributions of labor from the residents of the town, to repair its streets would free it from responsibility for injuries sustained by reason of defective streets or sidewalks. The liability of a town for injuries caused by defective ways springs from its negligence in the performance of corporate duties, and that cannot be said to be a duty which the municipality has no power or agency to perform. But the proof introduced by the defendant falls short of the principle it was intended to support. By its charter the city of Meridian is given extensive powers of taxation over property, persons, and privileges, and one half of the taxes derived from real and personal property is directed to be appropriated to "the laying out, grading, improving, and keeping in repair the streets and avenues of the city."

The real position assumed by the city is, that its revenues appropriable to its streets were expended in other and more populous parts of the city, leaving no sums to be devoted to repairs of streets in less frequented parts, by reason of which the street where the accident occurred, as well as many others, had never been graded or worked upon. The defense of want of funds is really blended with another, which is more prominently set forth, and is, that the city was not bound to open and put in repair the street on which plaintiff was walking when injured, because it was not needed for the use of the public generally, and if graded, would have been used by only one or two families.

It is true, we think, that a town is not called upon to open new streets in advance of public needs, and even where a street has been accepted,—recognized as a public way,—a different and less degree of care may suffice for one infrequently used than for those in the heart of the town. But it does not follow because a way is but little used, that the city may permit pitfalls and dangerous precipices to be made and continued in it.

It appears that many years ago one Stone, who then owned

the adjacent property, threw up a part of the street forming a sidewalk, which ended, at the intersection of Thirteenth Street with Twenty-fourth Avenue, in a precipitous descent of some five or six feet. One unacquainted (as was the plaintiff) with the way, who walked along Thirteenth Street toward Twenty-fourth Avenue, might well suppose that a way would be found into the avenue. Walking in the day, the condition of things would be at once observed; but in the darkness of night, the probabilities are that the ordinary traveler would first know of the danger by walking over the descent. This condition of things had existed for five or six years, and was either actually known to the city, or ought to have been known by the exercise of ordinary care. It was the duty of the city to know, within a reasonable time, of obstructions placed in the streets by others, and to cause the same to be removed.

It is not incumbent upon one who has sustained damage to prove that the city had actual notice of the defect by which the injury was caused. Negligent ignorance is no less a breach of duty than willful neglect. The circumstances of each case must determine whether constructive notice of the defect is to be attributed to the corporate authorities; but where, as here, the defect was manifest, and of such dangerous character as to obtrude its existence to the most casual observer, and had existed through many years, but one conclusion can be reached, and that is, that the authorities of the city could only have remained ignorant by neglecting all supervision of the streets in that locality.

The evidence introduced by the plaintiff was abundant to show that Thirteenth Street had been accepted by the corporate authorities, and was one of the streets of the city.

The judgment is reversed, and cause remanded.

MUNICIPAL CORPORATIONS — DUTY TO KEEP STREETS IN REPAIR. — A municipality must keep its streets in repair, so that ordinarily prudent persons may use them without injury to themselves: *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827, and note; *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35, and note. But see *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32, and note. In the absence of an express statutory provision, the municipality is still bound to keep its streets, alleys, bridges, etc., in a condition which will give safety to those traveling upon them; for such duty is implied from the authority given to the municipality to levy taxes for such a purpose: *Board of Commissioners v. Topeka*, 39 Kan. 197; and where the charter of a city imposes the duty of keeping its streets and sidewalks in repair, it must do so: *Young v. Village of Waterville*, 39 Minn. 196. So that when a city through negligence allows its streets to become defective, it must suffer the consequences in damages

to any who are injured thereby: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144, and note; *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *City of Denver v. Williams*, 12 Col. 475. So a city may become liable for leaving an unguarded and steep embankment alongside a public street: *Olson v. City of Chippewa Falls*, 71 Wis. 558; or for depositing or permitting others to deposit refuse material in a river adjoining a street, so that the deposit has the delusive appearance of a prolongation of the street: *Ray v. St. Paul City*, 40 Minn. 458; or for a failure to place a railing along a street, where the circumstances demand it for public safety: *Higgins v. Boston*, 148 Mass. 484; *County Commissioners v. Broadwaters*, 69 Md. 533; or for failing to guard excavations in streets: Note to *Sparhawk v. City of Salem*, 79 Am. Dec. 702-705; or for any non-repair, whereby the public are endangered in their traveling: Note to *Weisenberg v. City of Appleton*, 7 Am. Rep. 43, 44; note to *Raymond v. City of Lowell*, 53 Am. Dec. 67, 68.

NOTICE OF DEFECTS IN STREETS. — What will charge a city with notice of defects in its streets: *Turner v. City of Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453, and cases cited in note. A city must be presumed to know of defects in its streets when for nine years it has neither repaired such streets nor examined them: *Sherwood v. District of Columbia*, 3 Mackey, 276; 51 Am. Rep. 776. Knowledge by a policeman of defects in a street is knowledge of the municipality: *Carrington v. St. Louis*, 89 Mo. 208; 58 Am. Rep. 108; *Rehburg v. Mayor*, 91 N. Y. 137; 43 Am. Rep. 657. Notice of defects in a sidewalk may be presumed, when they have existed some length of time: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144. Notice to an officer of a city is notice to the city of defects in the streets: *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594, and note. Proof that a mortar-box was placed in a public highway on Saturday afternoon, and the overseer of the public roads in that district had notice of such fact Sunday morning, is notice sufficient to make the town liable for an injury sustained by a traveler upon the road Sunday evening: *Bloor v. Town of Delafield*, 69 Wis. 273.

MUNICIPAL CORPORATIONS. — Sidewalks are generally built by the abutting property owners, not by the finances of the municipality; so that knowledge by one who is hurt by a defective sidewalk, as to the want of finances in the city treasury, will not charge him with notice of the defects: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144.

LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY v. STATE.

[66 MISSISSIPPI, 662.]

CONSTITUTIONAL LAW—STATUTE PROVIDING SEPARATE ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS. — A statute providing "that all railroads carrying passengers within this state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger-cars for each passenger train, or by dividing the passenger-cars by a partition, so as to secure separate accommodations," and also providing that any railroad failing to comply with such requirements shall be deemed guilty of a misdemeanor, is constitutional, and not in conflict with section 8 of arti-

de 1 of the United States constitution, regarding the regulation of interstate commerce, so far as such statute applies to the transportation of passengers within the state, although the railroad indicted extends through different states, and is engaged in carrying interstate passengers—

SECTION 3 of the act referred to in the concluding section of the opinion is as follows: "Every conductor of trains carrying passengers in this state is hereby authorized to assign passengers to any car or to seats in a particular part of any car on his train; provided that equal accommodations are given to passengers holding tickets of the same class, and any forcible resistance to such assignment shall be deemed a breach of the peace."

Yerger and Percy, and W. P. and J. B. Harris, for the appellant.

T. M. Miller, attorney-general, for the state.

COOPER, J. On the 2d of March, 1888, the legislature of this state passed an act entitled "An act to promote the comfort of passengers on railroad trains," which is as follows:—

"Section 1. That all railroads carrying passengers in this state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger-cars for each passenger train, or by dividing the passenger-cars by a partition, so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power and are hereby required to assign each passenger to the car, or the compartment of a car (when it is divided by a partition), used for the race to which such passenger belongs; and should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court in this state.

"Sec. 3. All railroad companies that shall refuse or neglect, within sixty days after the approval of this act, to comply with the requirements of section 1 of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars, and any conductor that shall neglect or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense."

On the first day of August, 1888, the appellant was indicted in the circuit court of Tunica County for failure to comply with section 1 of the act above, and in defense pleaded that it "owned and operated a continuous road running from the city of Memphis, in the state of Tennessee, through and across the state of Mississippi, and to the city of New Orleans, in the state of Louisiana, carrying on its passenger trains passengers of both the white and colored races, from Memphis, and other points in the state of Tennessee, destined to New Orleans, and other points in the state of Louisiana, and other states in the United States, and so carrying passengers of both races from New Orleans, and other points in the state of Louisiana, destined to Memphis, Tennessee, and other points in the state of Tennessee, and elsewhere throughout the United States; that it doth now, and hath at all times and on all occasions, provided equal but not separate accommodations for passengers of the white and colored races; that to provide separate accommodations for the two races would greatly increase the cost of carrying the interstate passengers aforesaid, and greatly hinder, delay, and obstruct the defendant in making its interstate connections with other carriers of passengers, and that it hath not since long prior to the first day of May, 1888, carried any passenger in the county of Tunica, or within the limits of the state of Mississippi, save only upon its trains regularly engaged and operated in the interstate carriage of passengers aforesaid, and in all instances actually carrying such interstate passengers; the right, privilege, and immunity of doing which, free from any government regulation or control thereof, save by the Congress of the United States, the defendant doth plead and claim, under article 1, section 8, of the constitution of the United States; and this the defendant is ready to verify; wherefore," etc.

To this plea a demurrer was interposed by the state, which was sustained by the court, and thereupon, a plea of not guilty being filed, there was trial and conviction, and the defendant appeals.

It is assumed by counsel for appellant that the act under consideration was intended to regulate not only the transportation of passengers taken up and set down within the state, but those taken up within the state to be carried without, those taken up without to be brought within, and those taken up without to be carried across the state and into other states.

An examination of the record shows that the omission for

which the indictment was found was the neglect to provide the "separate" accommodation required by section 1 of the act, and not for failing to assign to such separate car or compartment interstate travelers upon appellant's train. We are not, therefore, called upon to determine whether the legislation in question would be valid if applied to persons other than those taken up within the state to be set down within it. Confining our attention to the question necessarily involved, it being also the distinct issue presented by the plea of the company, the inquiry is, whether the state is precluded from requiring separate accommodations for purely domestic travelers of different races because to furnish the same would impose a burden upon the carrier, or because the requirement affects interstate travel upon the trains of the company.

Upon this question, this court sustains the relation of an inferior tribunal, and, without regard to the opinions of its members, must conform to the decisions of the supreme court of the United States, by which court only can an authoritative decision be made. Without attempting to argue for or against any conclusions reached by that court, we shall endeavor only to deduce from them the principles proper to be applied to the decision of the question involved.

The development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed to the generation of this day the magnitude of the power delegated to the federal government by that clause of section 8 of article 1 of the constitution by which Congress is given power "to regulate commerce with foreign nations and among the states and with the Indian tribes."

It is not surprising that the recognition of its extent has been of gradual growth in the court called upon to construe it, nor that in judicial utterances there have been inconsistent and conflicting expressions. It does not lie within our province to point out or criticise real or supposed inconsistencies, but taking the more recent decisions of that court, where they have limited or overruled prior cases, to apply the principles, as we understand them to be now announced, to the cause before us. But it does not follow that we are to treat decisions not clearly overruled as not longer binding because remarks are to be found in later cases, which, somewhat extended, may be thought to be applicale to the facts here involved.

We concede it to be settled, as stated by counsel for appellant, that transportation of persons is as much commerce as

transportation of property, and as a corollary, that the interstate transportation of persons is interstate commerce, and that the state may not regulate such commerce, since it is national in character, and requires uniformity of regulation. It may also be conceded that absence of legislation by Congress on the subject is indicative of its will that such commerce shall be free and untrammelled. The question returns, whether the act under consideration is a regulation of interstate commerce, and upon its solution hinges the controversy.

The cases of *Hall v. Decuir*, 95 U. S. 485, and *Wabash etc. R. R. Co. v. Illinois*, 118 Id. 557, are relied upon as decisive against the validity of the statute. We do not so understand them.

Hall v. Decuir, supra, was a case in which the validity of a statute of the state of Louisiana was involved. The statute, in effect, required all persons engaged within that state in the business of common carriers of passengers to admit all persons traveling on the conveyance employed in the business to equal privileges in all parts of the conveyance, without discrimination on account of race or color, and a right to recover actual and exemplary damages was given to any person injured by the refusal of the carrier to comply with the law. Decuir, a passenger from one point to another within the state, was refused access to the cabin reserved for white passengers, on a steamer engaged in interstate business on the Mississippi River, and brought suit against the owner of the boat to recover damages. The statute was held unconstitutional by the supreme court of the United States, as being a regulation of interstate commerce. As observed by this court in *Yazoo etc. R. R. Co. v. Stone*, 62 Miss. 607, the state of Louisiana had no relationship to or control over the instruments by which the commerce was conducted. It was an attempt to regulate an interstate carrier, acting under license from the United States, and plying the navigable waters of the same. The state had no control over the way, the boat, or the owner. It was an attempt to regulate that which it did not create or license, and which it might neither control nor destroy. The language of the court, as applied to the facts of that case, is compatible with a liberal exercise by the state of power over its own corporations, which live and move and have their being by virtue of its laws. It is urged, however, that in *Wabash etc. R. R. Co. v. Illinois, supra*, it has been held equally incompetent for the state to regulate interstate commerce conducted over artificial

ways created by the state, or under its authority, as to regulate commerce on the navigable waters of the United States. In that case, the only question presented or decided was, whether a state statute, controlling the rates to be charged by the common carrier for transportation of freight within the state, could be applied to a contract for continuous transportation from a point without to a point within the state. It was held that it could not, since the contract was for interstate commerce, and, as such, not within state regulation or control.

In delivering the opinion of the court, Miller, J., reviews the cases of *Munn v. Illinois*, 94 U. S. 113, *Chicago etc. R. R. Co. v. Iowa*, 94 Id. 155, and *Peik v. Chicago etc. R. R. Co.*, 94 Id. 164, and declares much that was said in them to have been decided without sufficient consideration. His criticism of those cases was, however, confined to so much thereof as affirmed the right of the state, in the absence of legislation by Congress, to regulate the transportation of property or persons from points within to points without the state. We are not warranted in extending the effect of the decision so as to include denial of the right of the state to regulate domestic transportation, though conducted by carriers engaged in interstate commerce. Indeed, the express language of the court excludes such conclusion, for the majority opinion declares that "if the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid."

The question here is a different one from either of those involved in these cases. It is more nearly akin to that decided in *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, in which the right to regulate domestic commerce was considered and upheld. It is a matter of common knowledge that there are at present many state commissions for the regulation of state commerce, and one by the general government for the regulation of that between the states. Each occupies a field from which the other is excluded, and each is essential, or deemed so to be, to full control of the commerce of the country. By what authority can the transportation of domestic travelers be controlled if not by that of the state? Congress has no jurisdiction over the subject, it being confined to commerce "with foreign nations, and among the states, and with the Indian tribes." Suppose Congress should

deem it advisable to enact a law similar to our statute for the regulation of interstate transportation of passengers, could it be contended that it controlled as to passengers taken up and set down within a state?

But how does the statute interfere with interstate commerce, if it be true that it has no application save to those traveling wholly within the state? It is manifest, from the plea, that the statute is resisted because it imposes a burden, not on commerce, but upon the carrier. The addition of a car at the state line to each of its trains may impose additional expense to the company, but how it is a burden upon or obstruction to commerce it is difficult to perceive. We do not know of any decision in which the supposed burden on commerce, easily obviated by the act of the corporation, has been held to invalidate a statute, in the interest of the carrier. The United States have no concern with the policy merely of domestic state laws. It may be that they are harsh, or unfair, or unjust. Admit it, and what follows? Surely not that they are invalid, but only that they should be repealed by that power having jurisdiction of the subject.

It would seem to follow that since the transportation of passengers and of property stand upon the same footing, regulations of property within state limits being valid, regulations touching passengers of the same character, i. e., domestic travelers, are also valid.

We do not think the act under consideration was repealed by section 3 of the act of March 14, 1888.

The judgment is therefore affirmed.

CONSTITUTIONAL LAW — CIVIL RIGHTS. — "An act to provide that all citizens shall be entitled to the same civil rights" is within the power of a legislature: *Messenger v. State*, 25 Neb. 674; but all legislation discriminating against a particular race is in violation of the federal constitution: *Duncan v. Lee*, 83 Ky. 49.

Under the statutes of Iowa and Nebraska, owners of barber-shops cannot discriminate against negroes because of their color or race: *State v. Hall*, 72 Iowa, 525; *Messenger v. State*, 25 Neb. 674.

So under the statutes of Illinois, Louisiana, and Mississippi it has been held that owners of theaters cannot lawfully deny negroes access to their theaters, or to the several grades of seats therein, on account of race and color: *Baylies v. Curry*, 128 Ill. 287; *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102; *Donnell v. State*, 48 Miss. 661; 12 Am. Rep. 375. But see note to *McOrea v. Marsh*, 71 Am. Dec. 749, as to the effect of civil-rights laws as applied to a negro's right to admission into places of amusement.

Likewise it has been decided that a negro may not be excluded from a public skating-rink simply because of his race and color: *People v. King*, 110

N. Y. 416; 6 Am. St. Rep. 389; but a negro may be excluded from a skating-rink which is not licensed, though kept for hire: *Bowlin v. Lyon*, 67 Iowa, 536; 56 Am. Rep. 355.

But statutes establishing a separate system of schools for the white and colored children are valid, not being in violation of the federal constitution; and, under such laws, colored children may be excluded from schools provided for white children exclusively, when other schools have been provided for the colored children: *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 327; 17 Am. Rep. 738; *People v. Gallagher*, 98 N. Y. 438; 45 Am. Rep. 232, and note 246-259.

SMITH v. RATCLIFF.

[65 MISSISSIPPI, 682.]

EXEMPTIONS. — **INSURANCE MONEY DUE ON THE LOSS OF A HOUSE** which was part of the homestead of the insured is not exempt from levy under execution or attachment.

GARNISHMENT against the Equitable Insurance Company. The judgment debtor admitted the indebtedness, but claimed the money in dispute as exempt, because it was the proceeds of a fire insurance policy on his house, which was part of the homestead when it was burned. Judgment against plaintiff, and he appeals.

R. H. Thompson, for the appellant.

H. Cassedy, for the appellees.

CAMPBELL, J. The single question presented by this record is this: Is the money due from an insurance company on the loss of the house, which was a part of the homestead of the insured, exempt from liability to legal process against the homestead exemptionist?

If called on to declare what should be the law, our answer would be, that, inasmuch as the house was exempt, the money due because of its destruction should be, to enable the owner to rebuild. This would accord with the policy which secures the homestead against the demands of creditors; for it is undoubtedly true that a contract made to secure its owner against the consequences of loss from the destruction of what the law has endeavored to secure to him, by denying to his creditors the right to take it for debts, ought to secure its avails to the exemptionist for the purpose of replacing his loss; and thus he would be encouraged to secure indemnity for such a loss by effecting insurance. We perceive how completely it is in

the power of the insured to defeat the pursuit of creditors by inducing the insurer to rebuild, where the contract provides for this; and therefore of how little value an announcement of the liability to his creditors of money due for such a loss as we have supposed, to an exemptionist, will ordinarily be. But regarding it as our duty to declare the law as we understand it to be, and not to make it (when we find it already made), we are constrained to announce that the question stated in the beginning of this opinion must be answered in the negative.

This results, necessarily, from the established doctrine, which is, that only those things are exempt which the statutes declare to be, and everything not embraced is liable to creditors.

A homestead is exempt, and the house is part of it; but the money due on a policy of insurance on the house is neither the house nor the representative of it. It is the result of a personal contract of indemnity against the loss of the house, which contract was founded on an independent consideration in the premium paid by the insured. The house was the subject of the contract, it is true, but the indemnity was purchased by its price, the premium paid. What the law exempts is the homestead, and not what may grow out of it or arise from it as the result of some contract made by the exemptionist, — the homestead, and not the proceeds of it in another form which is not exempt. If the exemptionist had sold his house, the debt due for it would not be exempt, because the statute does not declare that money shall be exempt which arises by contract from what is exempt.

The money made by the use of the homestead is not exempt; and when exempt property is by act of the exemptionist converted into what is not exempt, the protection of the exemption laws cannot be claimed. But even if the proceeds of the homestead were exempt, the money due by the policy of insurance would not be, for it is not the proceeds of the house but of the policy, — an independent personal contract. The house was not insured. The owner was insured by the contract to pay him a sum of money as indemnity against loss.

These principles are universally recognized, so as to deny to a mortgagee, who has no special contract right as to insurance, the right to claim the proceeds of a policy of insurance as appropriable to his mortgage on the insured property; and we have held that a fraudulent grantee of land may hold the money due by a policy of insurance on a building on it against

the claim of creditors entitled to subject the land and buildings to follow the insurance money: *Bernheim v. Beer*, 56 Miss. 149.

It follows logically, from these settled principles, that the insurance money does not occupy the place of the destroyed building, and if not, there is no legal ground on which to affirm that it is exempt because the building was.

This view is fully sustained by the supreme court of New Hampshire: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128. Thompson on Homesteads and Exemptions, sec. 750, says: "The insurance money is not liable to garnishment," and cites *Houghton v. Lee*, 50 Cal. 101, and *Cooney v. Cooney*, 65 Barb. 524, to support this view; and after stating the denial of this rule by the supreme court of New Hampshire, adds: "But the rule is founded on reasons too cogent to be shaken by the dissent even of that able court."

What are the reasons? They are not given by Thompson, and the California court in the case cited did not state any reason, but simply affirmed the judgment of the lower court. The New York case is the decision of an inferior court, and while the opinion in the case is longer than in the California case, it is as destitute of any satisfactory reason to sustain its conclusion as is the other, which does not attempt to furnish any.

Smyth on Homesteads, sec. 102, follows Thompson, citing the California case above.

The question was before the supreme court of Texas in *Cameron v. Fay*, 55 Tex. 58, and it was held that the insurance money was not liable, citing *Houghton v. Lee*, 50 Cal. 101; Thompson on Homesteads, 750; citing also *Cooney v. Cooney*, 65 Barb. 524.

The Texas case so strikingly illustrates the illogical conclusion of the court, in deciding it, as to forbid our adoption of it as a precedent. In that case the mechanics who erected the building insured, and had a lien on it, were denied the right to follow through the ashes the money arising from the insurance, on the universally accepted doctrine that this money resulted, not from the building, but from a personal contract of indemnity founded on an independent consideration; but when the mechanics sought to apply the money to their judgment as lien creditors, the court, which had said that the money did not represent the house, but was the avails of contract, on this contention held that the money did occupy the place of the

house; thus presenting a conspicuous example of reasoning to a just result on one question in the case, and leaping to a desired conclusion on another question in the same case,—an example we shrink from imitating. In that case the court says: "We are of opinion that the proceeds of the policy of insurance upon the homestead, effected for its protection and preservation as such, should, for a reasonable time at least, be exempt," etc. What is a reasonable time, and how is this to be determined? That view is not only unsupported by principle, but is full of practical difficulty.

We, too, think, with the Texas court, that the proceeds of the policy should be exempt, as the house was; but the statute has not made it so, and it is impossible to reason correctly from established rules to the conclusion in favor of exemption, and we do not think it allowable to jump to a desired result. We might have done so, and cited Thompson and Smyth as authority for the announcement; but it is not always safe to accept without question what is laid down in text-books or the opinions of the courts.

Judgment reversed, and the money directed to be applied to the judgment.

ATTACHMENT AND GARNISHMENT. — An unadjusted loss on a policy of insurance may be attached: *Knox v. Protection Ins. Co.*, 9 Conn. 430; 25 Am. Dec. 33. An insurance company may be liable as a garnishee or a trustee, after a loss, even though the insured property was exempt from attachment: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128.

ATTACHMENT AND GARNISHMENT. — Unpicked cotton while upon a homestead is exempt from attachment, but ceases to be so as soon as picked: *Coates v. Caldwell*, 71 Tex. 19; 10 Am. St. Rep. 725.

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CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BARRY v. HANNIBAL AND ST. JOSEPH R'y Co.

[98 MISSOURI, 62.]

NEGLIGENCE IN THE MANAGEMENT OF HAND-CAR. — Where the evidence shows that an engineer was killed by being run over by a hand-car, and that such car was being run at a high rate of speed, and at a time when it had no right to be on the track, when the persons operating it knew that the train-men would be at work, and would not be on the watch for it, and were not on close watch of the track in advance of them, and that if they had been they would have seen the deceased, it sufficiently appears that such hand-car was negligently operated, and that, from this cause, such engineer came to his death.

CONTRIBUTORY NEGLIGENCE IN NOT OBEYING RULES OF A RAILWAY CORPORATION. — An engineer should not be held guilty of contributory negligence, on a demurrer to the evidence, because, when injured, he was not on his engine, as required by a rule of the company, if it further appears that there was an established usage of the defendant's engineers, known and acquiesced in by its superior officers, to allow engineers to alight from their engines, and to permit their firemen to make short moves, the engineers remaining sufficiently near to give directions. This custom amounted to an abandonment of the rule to the extent of the custom.

USAGE. — KNOWLEDGE OF A USAGE NEED NOT BE SHOWN BY DIRECT EVIDENCE, BUT MAY BE INFERRED from circumstances or implied from its notoriety. Hence it may be inferred that the superior officers of a corporation knew of a custom existing in violation of a rule of such corporation, when such custom was well known among its employees, and of long standing.

CONTRIBUTORY NEGLIGENCE. — IT CANNOT BE HELD AS A MATTER OF LAW that an engineer was guilty of contributory negligence from the fact that he left his engine for the purpose of getting signals, when it was no part of his general duty to do so.

SERVANTS INJURED OUT OF LINES OF THEIR USUAL DUTY. — In case of an emergency, a servant may of his own volition step outside of his usual duty. If the departure be such a one as the necessity of the case fairly

and reasonably calls for, keeping in view the character of the work which the servant has contracted to perform, then such departure will not of itself defeat a recovery of damages in case he is injured.

NEGLIGENCE — QUESTION FOR JURY. — An engineer will not be adjudged guilty of negligence, as a matter of law, merely from the fact that he stood upon the railway track from five to thirty seconds without looking for approaching cars, when he had no reason to apprehend the approach of the car by which he was injured.

NEGLIGENCE — WHEN A QUESTION OF LAW AND WHEN OF FACT. — If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but if reasonable men may differ as to the conclusions to be drawn from the governing facts, then the question of negligence must be determined from all the surrounding circumstances. It then becomes a question of mingled law and fact, and must be determined by a jury.

INCONSISTENT INSTRUCTIONS. — Though there is a seeming inconsistency in the instructions, the judgment will not be reversed when there is a general instruction fairly submitting the case to the jury, and it is clear, from the evidence, that their verdict is right.

Strong and Mosman, for the appellant.

S. P. Huston, H. Lander, and A. W. Myers, for the respondent.

BLACK, J. The widow of Timothy Barry brought this suit to recover damages for the death of her husband. From the evidence, it appears that defendant's road at Stewartsville runs in an east and west direction. Barry, who was an engineer in the employ of the defendant, pulled his train of twenty-two freight-cars in at the west switch between sundown and dark to clear the main track for a west-bound passenger train then due. The head brakeman went forward to couple some loose cars standing on the side-track, that they could be moved forward out of the way. When Barry stopped his train, he supposed it was in on the side-track. He could not see to the rear of it from the south side, because of some cattle-pens, nor from the north side of the cab, because of a curve in the road to the south of the west switch. He got down on the ground to examine his engine, and while there he heard a call from the rear brakeman, who stood on the main track, some eighteen car-lengths from the engine. Barry stepped to the north six or seven feet to and on the main track. He then directed the fireman to move the train forward. While standing on the main track, and looking to the rear of his train, a hand-car with five or six section-men on it came from the east, ran on him, and inflicted the injuries from which he died; and the plaintiff's cause of action is predicated on the negligence of these section-men.

These section-men were running their car at a very rapid rate of speed, evidently to keep in advance of the passenger train. They reached the depot at 7:30, and the passenger train was due at 7:22; so that they were on the time of the passenger train. When at the depot they could see to and beyond the place where Barry was hurt. He stood some four hundred feet west of the depot. Hadley, one of the men on the hand-car, testified that he was facing west, and kept a sharp lookout; that they were about one hundred and fifty yards from the engine when they saw a clear track; that when they got a little farther, the engine began to move, and the escaping steam obscured their vision, so that they did not see Barry until they got within forty or fifty feet of him. The witness says that up to that time he could have seen a man on the track, but he saw no one. The evidence of the fireman and two brakemen is to the effect that Barry stood on the main track not less than five or ten and not more than thirty seconds before the steam began to escape. The evidence shows that it was not, in general, the duty of the engineer to leave his engine to receive signals, but that it was the duty of the brakemen to put themselves in a position to be seen by the engineer or fireman.

The defendant put in evidence rule 41, which, it is conceded, relates to engineers and firemen, and is in these words: "41. They must not permit the fireman to operate the engine except when they are themselves present upon them. Both the engineer and fireman must remain upon the engine while it is at work." There is, however, much evidence to the effect that at the time of the accident, and for years prior thereto, it had been the constant custom of engineers on the defendant's road to allow their firemen to make short moves, like the one in question, the engineer being near at hand, but not on the engine, at the time. This custom is shown to have prevailed at all stations, except terminal points, where hostlers take charge of the engines on their arrival.

1. The point made by the appellant, that there is no evidence of negligence on the part of the section-men, is clearly not well taken. They knew the train-men were at their accustomed work with the train, and that these train-men would not be on the watch for the hand-car; for the usual working hours of the section-men were from seven to six o'clock. Instead of taking their car off the track, and waiting for the passenger train to pass, they came to the depot in great haste;

and the evidence tends to show that, though then out of danger, they did not attempt to slacken their speed. As Barry was on the main track from five to thirty seconds before the steam began to escape, it may be inferred that the section-men were not on close watch of the track in advance of them, and if they had been, they would have seen him. There is abundant evidence tending to show that they did not manage the car as prudent persons would do under the circumstances, and this is the standard by which the question of negligence on their part should be determined.

2. The position taken by the appellant, that Barry should be held guilty of contributory negligence on a demurrer to the evidence because violating rule 41 at the time of the accident, is untenable. If there was an established usage on the part of the defendant's engineers, known and acquiesced in by the superior officers, to allow firemen to make short moves, the engineer not at the time being on the engine, but near enough to give directions, then Barry could not, and ought not, to be held guilty of contributory negligence for violating the rule. Under these circumstances, the custom would amount to an abandonment of the rule by the defendant to the extent of the custom. Indeed, it is probable that defendant's officers did not regard this slight departure as a violation of the rule at all. The court, by the second instruction given at the request of plaintiff, told the jury that if there was such a custom, then they might take that into consideration in determining whether deceased was negligent in leaving the engine. Defendant has no right to complain of such an instruction.

But it is further insisted that there is no evidence that the superior officers knew of the existence of such a usage. Knowledge of the usage need not be shown by direct evidence that these officers saw the custom practiced. Notice may be inferred from circumstances. It may be implied from the notoriety of the custom: *Lawson on Usages and Customs*, sec. 21. The evidence in this case tends to show that the usage was well known among the defendant's employees, and of long standing, and from this the jury could with propriety infer notice to the defendant's officers.

3. While it was not the duty of an engineer to leave his engine for the purpose of getting signals, still, it cannot be ruled as a matter of law that the plaintiff must fail in this suit because Barry stepped out on the main track to get the signals, even though it was no part of his general duties thus

to do. As a general rule, it may be conceded that a servant has no claim upon the master for damages for an injury which the servant receives by voluntarily assuming to do something which the master did not employ him to do. Emergencies do arise when he may be called upon to make slight departures from his accustomed work: Wood on Master and Servant, sec. 89. So in case of an emergency, he may of his own volition step outside of the line of his usual duties. If the departure be such only as the necessities of the case fairly and reasonably call for, keeping in view the character of the work which the servant has contracted to perform, then such departure will not of itself defeat a recovery of damages in case he is injured: 2 Thompson on Negligence, 1017. Here the head brakeman had gone to the forward cars, so that he could not transmit the signal from the rear brakeman to the engine, as was the usual practice. The conductor was at the depot. It seems the rear car had not cleared the switch, and the passenger train was then due. Under these circumstances, the jury may well have found that an emergency existed which made it proper or even the duty of Barry to step out on the main track to get the signals, and the question was one for the jury to determine.

Of course the plaintiff cannot recover if Barry was guilty of negligence in standing on the main track without looking out for approaching cars. Whether he was guilty of negligence in that respect was again a question for the jury. The fact that he stood on the main track from five to thirty seconds without looking to the east does not, as a matter of law, make him guilty of negligence. His conduct must be tried in the light of all of the surroundings. If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but if reasonable minds may differ as to the conclusions to be drawn from the given facts, then the question of negligence must be determined from all the surrounding circumstances. The question of negligence then becomes one of mingled law and fact, and must be determined by the jury: *Tabler v. Hannibal R. R.*, 93 Mo. 80; Shearman and Redfield on Negligence, sec. 11. The present case is peculiarly one where the question of negligence on the part of the section-men and of contributory negligence on the part of the deceased should be determined in the light of all of the surroundings. These observations are enough to show that the court did not err in refusing to give certain instructions asked by the

defendant. Indeed, some of the instructions given at the request of defendant should have been refused.

4. The next contention is, that the first instruction for the plaintiff and the seventh and eighth for the defendant are inconsistent. By the first, the jury were required to find that it was necessary for Barry to go upon the main track in order to get the signals, and that it was his duty so to do under the circumstances, and it then proceeds to state, and that, "without fault or negligence on his part, he was run upon and fatally injured by a hand-car run and operated by defendant's agents and servants on its railroad, without notice to or knowledge by the deceased, and that such hand-car was run, without lights or other signals of approach, at a rapid rate of speed, and that such running of the hand-car was, considering the time, place, and circumstances, negligent, careless, and dangerous, and that such hand-car was so run under the orders, direction, and control of defendant's section-boss, . . . then the finding should be for plaintiff."

Defendant's seventh and eighth instructions are in these words:—

"7. There is no evidence tending to show that the hand-car mentioned in proof was being run at a dangerous or unlawful rate of speed at the time that Barry was injured.

"8. The court instructs the jury that the defendant was not required to carry a light upon said hand-car, and was guilty of no negligence in failing to provide said car with such light."

The jury returned certain interrogatories, submitted to them at the request of defendant, which, with the answers thereto, are in these words:—

"Q. Was Barry standing between the rails facing and looking west at the time he was struck and injured by the hand-car? A. Yes.

"Q. Did the section-foreman, as his car was approaching, or while it was passing the depot, look along the track, and see that it was clear from obstructions up as far as the toolbox? A. No.

"Q. If any steam was escaping, did the escaping steam obstruct or prevent the men on the hand-car from seeing Barry as soon as they would have seen him but for the steam? A. If they had been looking they would have seen him before the steam obstructed the view.

"Q. Was there any steam escaping from said engine? A. There was when train moved.

"Q. Was it escaping in such a volume as to obstruct the view of persons looking from the depot westward along the track? A. Yes."

The defendant's seventh instruction should have been refused. Enough has been said to show that the jury, in determining the question of negligence on the part of the section-men, had a right to take into consideration the speed of the hand-car, for it was their duty to conform the speed of their car to the existing circumstances. Of course the fact that this instruction is too favorable to the defendant does not furnish a full and complete answer to the objection that the instructions are inconsistent.

It will be observed that the plaintiff's instruction does not predicate a recovery on the ground alone that the hand-car was operated without lights or other signals, and at a rapid rate of speed; but the jury are required to find that such running was careless and negligent, considering the time, place, and circumstances. Thus the real question in the case is fairly and properly submitted to the jury. The jury must have found that deceased was without fault, and that these section-men were negligent. The special findings show that they could have seen Barry before the steam began to escape had they or any of them been on the constant watch of the track in advance of their car. If we concede that the speed of the car and want of lights do not alone furnish sufficient facts to justify the verdict, still the general and special findings are supported by abundant evidence. The plaintiff's instruction is general, and submits the question of negligence to the jury on all the facts in evidence, while the seventh and eighth given at the request of the defendant are special, and they seek to eliminate some of the evidence from the case. While there is a seeming inconsistency in these instructions, still the judgment ought not to be reversed. If this were a close case on the evidence, we should feel in duty bound to order a new trial; but taking into account all of the evidence, it is clear that these section-men were guilty of inexcusable negligence, and that their negligence caused the death of Barry.

The judgment is so manifestly for the right party, that it ought to be and is affirmed.

CONTRIBUTORY NEGLIGENCE. — Where a railroad company by a rule prohibited conductors and engineers from making flying-switches, a brakeman working under the direction of an engineer was not guilty of contributory negligence when the manner of switching by which he was killed had been

the customary way, although he knew it was against the rule: *Union P. R'y Co. v. Springsteen*, 41 Kan. 724.

CONTRIBUTORY NEGLIGENCE IS ORDINARILY A QUESTION OF FACT for the jury to determine: *Higgins v. Deeney*, 78 Cal. 579; *Marsland v. Murray*, 148 Mass. 91; 12 Am. St. Rep. 520, and note; *Chicago etc. R'y Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87, and note. And so the question of negligence is under ordinary circumstances for the jury to decide: *Foxworthy v. City of Hastings*, 25 Neb. 133; *Solby v. Clayton*, 12 Col. 80; *Durbin v. Oregon R. R. & Nav. Co.*, 17 Or. 5; 11 Am. St. Rep. 778, and numerous cases cited in note.

CONTRIBUTORY NEGLIGENCE, INSTANCES OF: Note to *Durbin v. Oregon etc. Nav. Co.*, 11 Am. St. Rep. 786.

TETHEROW v. ST. JOSEPH AND DES MOINES R'Y CO.

[98 MISSOURI, 74.]

NEGLECT, WHEN A QUESTION OF LAW. — The court cannot properly pronounce certain facts to constitute negligence, as a question of law, unless no other inference may be fairly and reasonably drawn from the testimony on the subject.

EVIDENCE OF THE CONDITION OF A RAILWAY TRACK NEXT TO THAT WHERE AN INJURY TOOK PLACE is admissible as part of the description of the surroundings, as part of the *res gestæ*, if the defense is negligence on the part of the injured person in handling his team and wagon, and in other respects.

RAILROADS, LIABILITY OF, FOR DEFECTIVE CROSSINGS. — It is the duty of a railway corporation owning tracks running across a public street in a city to provide good and safe crossings, such as will enable travelers to pass over such tracks in safety; and if it carelessly and negligently permits the rails of such tracks to be and remain several inches above the road-bed and traveled way of the street, and above the ground between such rails, thereby rendering such crossings dangerous and unfit for travel, it is answerable in damages, if a person driving his wagon and team along the street at the crossing, exercising ordinary care, and having his load in a reasonably safe condition on the wagon, is thrown from his wagon and killed.

ORDINARY CARE IS SUCH AS A PERSON OF ORDINARY PRUDENCE AND CAUTION, according to the standard of the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the person whose conduct in that regard is in question in a given case.

EVIDENCE OF THE NUMBER AND AGES OF THE PLAINTIFF'S MINOR CHILDREN IS ADMISSIBLE in an action by a widow to recover for the death of her husband, where she is, as in Missouri, at least during her widowhood, bound to support such children.

JURY TRIAL — INSTRUCTION. — A PARTY IS BOUND BY THE THEORY OF HIS OWN INSTRUCTIONS, and cannot complain, after obtaining certain instructions, that the court refused to give other instructions inconsistent therewith.

EVIDENCE THAT THE PLACE WHERE AN ACCIDENT OCCURRED HAS SINCE BEEN REPAIRED IS ADMISSIBLE, on the redirect examination of a witness, when the defendant has, on cross-examination, shown that no other accident has occurred there before nor since the one in question.

DAMAGES FOR THE DEATH OF A HUMAN BEING may, under the statute of Missouri, be such as the jury deems "just, with reference to the necessary injury resulting from such death," not exceeding five thousand dollars.

JURY TRIAL. — INSTRUCTIONS NEED NOT BE GIVEN TO THE JURY ON QUESTIONS OF LAW NOT SUGGESTED at the time by the parties or their counsel.

PRACTICE — SPECIAL ISSUES. — THE COURT NEED NOT SUBMIT TO THE JURY A SPECIAL ISSUE already included in those submitted, nor need it submit any question which may be answered affirmatively or negatively without affecting the general verdict.

ACTION by plaintiff, the widow of Levi Tetherow, to recover for the death of her husband, which she alleged was occasioned by the negligence of the defendant in not providing proper crossings over its tracks on Fourteenth Street, in the city of St. Joseph. The defendant denied all negligence on its part, and averred that the deceased came to his death through his own carelessness and neglect. The trial was before a jury; and the evidence tended to show the following facts: That the defendant had three tracks, all of which crossed Fourteenth Street at right angles thereto; deceased, driving a pair of mules along Fourteenth Street, and seated on top of a load of wood, approached these tracks from the south; the wood was piled lengthwise in an ordinary wagon-box to the top of the box, and above the top it was laid crosswise to a height of two or three feet; between the first and second tracks was a bridge spanning a stream of water; the deceased reached the third track in safety; his load was jostled out of place as he crossed this track, part of it rolled off and hit his mules; he was thrown off, run over, and killed. This third track was not planked, nor was it level with the roadway for a part of the width of Fourteenth Street. The defendant claimed that the plank crossing started from near its depot, and extended to a point about the center of Fourteenth Street, while the plaintiff's witnesses denied that this planking extended to any part of such street. The plaintiff, during the trial, was permitted to testify to the number and ages of her minor children. One of her witnesses was, on redirect examination, asked whether the railway company had since repaired the place where the accident occurred, and answered, "Yes, it has been graded off since." The court,

among other instructions for the plaintiff, gave the following:—

“1. The court instructs the jury that if they believe, from the evidence, that the defendant, before and on the twelfth day of September, 1884, owned two railroad tracks running across Fourteenth Street, in the city of St. Joseph, and that said Fourteenth Street was then and there a public street, and used by the public as such, then it was the duty of the defendant to provide and maintain good and sufficient crossings on said street, where said tracks ran across the same; that is, such crossings as enable travelers with wheeled vehicles to pass over said tracks with reasonable safety. And if the jury believe, from the evidence, that the defendant had, at said time, carelessly and negligently permitted the rails of its said track to be and remain several inches above the road-bed and traveled way of said street, and several inches above the ground and road-bed between the rails of said track, and had carelessly and negligently permitted holes and depressions to exist in said street at said crossings, thereby rendering said crossing unsafe, dangerous, and unfit for travel, and that on September 12, 1884, said Levi Tetherow was driving his wagon and team along said street, at said crossing, and that said wood was then and there in a reasonably proper and safe condition on said wagon, and that by reason of said condition of said crossing his wagon was jarred and jostled, and by said jarring and jostling he was, while using ordinary care, thrown from his wagon and killed, and that plaintiff was, at the time of his death, his wife, then the jury will find for the plaintiff”

“3. The jury are instructed that if you find for the plaintiff, you may, in your verdict, give her such damages, not exceeding five thousand dollars, as you may deem fair and just, under the evidence in the case, with reference to the necessary injury resulting to her from the death of her husband.”

“7. Negligence is the failure on the part of a person or corporation to take such precautions and observe such care as ordinarily prudent persons take or observe under a given set of circumstances; and taking such precautions as aforesaid is ordinary care.”

The jury, at the request of defendant, was instructed as follows:—

“A. Before the plaintiff is entitled to recover in this case, it

must appear, by a preponderance of the evidence, to your satisfaction, that the injury was occasioned solely by the alleged defect in the crossing in proof, without any fault, neglect, or mismanagement or want of ordinary care and attention on the part of the driver in guiding and controlling the movements of the team contributing to cause or bring about the same."

"D. If you find, from the evidence, that, at the time of the accident in proof, the crossing over defendant's track was in such a condition that a person exercising ordinary care, and bestowing ordinary attention to the road and to the movements of his team, could drive along over said street in perfect safety, your verdict must be for the defendant."

"H. If you find, from the evidence, that the deceased was sitting on the top of a load of wood, driving his team; that before reaching defendant's track the wood, in driving to that point, had been jostled out of place to such an extent as that it was then insecurely loaded, and in danger of falling off; that the deceased did not look to see how the wood was riding, nor stop to adjust and fix the same, but drove on, and that in consequence of the shape and insecure position in which the wood lay on said wagon when it arrived at the crossing, some of it tumbled off and struck the mules, causing them to become unmanageable, and to run off, thereby causing the accident,—your verdict must be for the defendant."

The court refused defendant's instruction No. 13, as follows:—

"13. If the jury believe, from the evidence, that defendant's track mentioned had two crossings, one at the point where Tetherow crossed at the time he was hurt, the other but a few feet easterly; that the condition and location of each were well known to him at and prior to that time; that the former was rough, difficult, and dangerous; that the latter, but a few feet distant, was easy, convenient, and reasonably safe for his team and loaded wagon to pass over; that on approaching these two crossings he was free to choose between them for his passage, and could rightfully pass over the better one, without delay or obstruction, or serious inconvenience to himself or others, and that he could have passed safely over the east crossing if he had so elected to pass, and in doing so had used ordinary and reasonable care,—then your verdict must be for defendant."

The jury gave a general verdict for plaintiff in the sum of

two thousand nine hundred dollars, and responded as follows to the special issues submitted to them:—

“Q. 1. Was not Tetherow caused to fall off his wagon by the wood on which he was sitting rolling down off the wagon, carrying him with it? A. Yes.

“Q. 2. At the time that Tetherow fell from his wagon, was the team beyond his control? A. No.

“Q. 4. At the time that Tetherow fell from his wagon, was his team going rapidly down off the crossing? A. No.

“Q. 5. Would Tetherow have fallen down off his wagon if the wood had been securely loaded upon the wagon at the time he was driving onto and over said crossing? A. Yes.

“Q. 6. Was not the crossing over the defendant's track in such a condition that persons driving along said street, by exercising ordinary care and attention, could, without difficulty, pass safely over the tracks? A. No.

“Q. 7. Was Tetherow in the exercise of ordinary care in driving on said crossing with his load of wood in the position and condition it was in when he got to the crossing? A. Yes.

“Q. 8. Could Tetherow have driven, without difficulty, in safety over the defendant's tracks, if his wood had been properly and securely loaded upon his wagon at the time he arrived at and attempted to pass over said crossing? A. No.

“Q. 9. Was not the team startled and caused to run by reason of the wood rolling down off the wagon and striking them? A. Yes.

“Q. 11. When Tetherow reached the defendant's south track at said crossing, had his wood shifted out of place so as to be insecurely loaded and in danger of falling? A. No.

“Q. 13. Was there a good, safe, and easy crossing of defendant's north track a few feet east of the point where Tetherow drove across said track? A. No.

“Q. 14. Did Tetherow, at the time, know the condition of both crossings of said north track? A. No.

“Q. 15. Was said easterly crossing of said north track open, unoccupied, and accessible to Tetherow at that time? A. No.”

The court refused to submit, as special issues, the following questions offered by defendant:—

“Q. 3. Was not Tetherow's fall from the wagon caused by the fact that he had momentarily lost control of his team, which was moving rapidly down from the crossing, and by the wood sliding out from under him while he was trying to check or stop his team?

"Q. 10. Would Tetherow have fallen from his wagon if he had not momentarily lost control of his team, and was unable to check or stop them?"

"Q. 12. Could Tetherow have driven, without difficulty, over the defendant's tracks in safety, if, when he got to and before he entered upon the tracks, he had stopped his team, had straightened up or readjusted the wood upon his wagon?"

"Q. 16. Would he have been delayed seriously in passing over the east crossing, or his journey lengthened materially?"

Defendant moved for judgment, notwithstanding the general verdict, also for a new trial and arrest of judgment, all of which motions were denied.

Strong and Mosman, for the appellant.

Green and Burns, James W. Boyd, and J. L. Sutherland, for the respondent.

BARCLAY, J. There was ample evidence for plaintiff tending to establish negligence on the part of defendant in failing to have a good and sufficient crossing, of the kind required by law (R. S., sec. 807), at the point where Tetherow was killed. There was also abundant evidence from which the jury might properly have found that deceased was negligent in the premises; but the facts were not such as justify the court in declaring, as matter of law, that he was negligent. Without attempting any extended review of the evidence, it may briefly be stated that, in view of the heavy load deceased was hauling, and of the condition and grade of the street approaching the point of the accident, and all the circumstances, it cannot justly be said that no inference but that of his negligence could be drawn from the fact that he did not change the direction of his team toward the east, after passing the bridge, and thus reach the plank crossing near the depot. His wagon struck the track within the limits of the traveled street, and his omission to turn out as indicated may not have been inconsistent with ordinary care. The court cannot properly pronounce certain facts to constitute negligence as a conclusion of law, unless no other inference may be fairly and reasonably drawn on the subject.

The evidence offered to show the condition of the second track crossed by Tetherow before reaching the third (where the injury took place) was admissible as part of the description of the surroundings, as of the *res gestæ*.

The defense was negligence on the part of deceased in handling his team and wagon, and in other respects. It was hence proper to inform the jury of the condition, grade, and several features of the street over which he drove just before reaching the point of injury.

There was evidence sufficient to support instruction No. 1, given for plaintiff, and we regard it as correctly stating the law applicable here. Instruction No. 7, defining negligence, was also sufficiently accurate. Ordinary care generally depends on the facts of the particular case. Except in those instances where the law (by express terms or otherwise) establishes some more exact rule, ordinary care is such as a person of ordinary prudence and caution, according to the standard of the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the person whose conduct in that regard is in question in the given case.

There was no error in permitting the plaintiff to state the number and ages of her minor children. The father, during his life (in the absence of any showing qualifying that liability), was bound to maintain the children. On his death, and during her widowhood at least, this liability was cast upon the mother according to the present law of Missouri, whatever may have been the rule at the common law, regarding which great differences of opinion have been expressed: *Furman v. Van Sise*, 56 N. Y. 435; 15 Am. Rep. 441; *Nightingale v. Withington*, 15 Mass. *272; 8 Am. Dec. 101; *Guion v. Guion's Adm'r*, 16 Mo. 48; 57 Am. Dec. 223; Reeve on Domestic Relations, Parker and Baldwin's 3d ed.; Schouler on Domestic Relations, sec. 254. Hence it was proper to show the extent of this burden, which the father's death placed on the plaintiff.

The refusal of defendant's instruction No. 13 was not error. The instructions given at the instance of defendant submitted to the jury the whole question of the actions of the deceased in the premises (with reference to care or negligence) as an issue of fact. The court was therefore justified in declining to separately submit a group of the same facts involved in a form which assumed the issue arising therefrom to be one of law only. Without deciding upon the correctness of the refused instruction, we think the defendant was bound by the theory presented by the instructions given at its instance. The refusal of another thus inconsistent therewith was no

error. When no question of public policy or express statute intervenes, parties are bound by the law as contained in the instructions they offer.

Defendant objects to the evidence given by the witness who said that since Tetherow's death the place had been graded off. This fact was first developed on the redirect examination of the witness. It was proper by way of explanation of the cross-examination, in the course of which the following questions were asked and answers given at the instance of defendant's counsel:—

"Q. Did you ever know of any other accident happening to anybody at this crossing? A. No, sir.

"Q. Never heard of any other or knew of any other? A. No, sir.

"Q. Neither before nor since? A. No, sir."

In view of this line of examination by defendant, it became permissible for plaintiff to show that no injury had since occurred there, because the place had been since repaired. Defendant is therefore not in position to complain of that ruling.

The instruction given by the court in regard to the measure of damages was correct as far as it went. Plaintiff was entitled (under our statute on the subject) to recover such damages as the jury might "deem just, with reference to the necessary injury resulting from such death," not exceeding five thousand dollars: R. S., sec. 2123.

If defendant's counsel thought, as is now claimed, that there were circumstances mitigating the damages, that question should have been presented to the trial court by an instruction embodying that idea. This was not done. The court is not required in a civil action to instruct the jury on questions of law not suggested at the time by the parties or counsel.

The action of the trial court on the special issues furnishes no just ground of exception. Of those which the court refused to submit that numbered 8 was included in those submitted. Those numbered 10, 12, and 16 (so far as not embraced in the questions answered) were immaterial, and properly refused for that reason.

The law regarding these special findings contemplated only the submission of such issues as would have a material bearing on the result. It was not designed to require answers to questions concerning every detail of disputed evidence. When

the proposed question might be answered affirmatively or negatively, without affecting the general verdict, it should manifestly have been rejected. Many of the questions submitted in the present instance might have been properly refused. There was no inconsistency between the material findings and the general verdict.

The damages awarded (two thousand nine hundred dollars) are not excessive in view of the regular earnings of the deceased, his age, and the expectations of life of husband and wife respectively. The assignments of error are not well taken.

The judgment is affirmed.

NEGLIGENCE, WHEN A QUESTION OF LAW. — Although the question of negligence is ordinarily for the jury, if the facts and the inferences which ought to be drawn therefrom are uncontroverted, their legal effect is for the court: *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604; *South Side Pass. R'y Co. v. Trich*, 117 Pa. St. 390; 2 Am. St. Rep. 672, and note; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Delaware etc. R'y Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730, and note; note to *Meloy v. Chicago etc. R'y Co.*, 14 Am. St. Rep. 325; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11; 9 Am. St. Rep. 387; *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; *Wilson v. Louisville etc. R. R. Co.*, 85 Ala. 269; *Chatham v. Jones*, 69 Tex. 744.

RAILROADS, DUTY OF, WITH RESPECT TO CROSSINGS, AND LIABILITY FOR DEFECTS THEREIN. — The right of a railroad company to interfere with a highway is coupled with a duty to make it as safe again for the traveling public as it was before the interference: *Palatka etc. R. R. Co. v. State*, 23 Fla. 546; 11 Am. St. Rep. 395, and note; *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865, and note; *Louisville etc. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Town of Jamestown v. Chicago etc. R. R. Co.*, 69 Wis. 648; *Cummins v. Evansville etc. R. R. Co.*, 115 Ind. 417. The Revised Statutes of Texas, requiring railroad companies to restore highways which have been crossed by their tracks, does not compel such companies to restore the crossings to such a condition as would not necessarily impair their usefulness: *Dallas etc. R'y Co. v. Able*, 72 Tex. 150. A railroad company accepts all the conditions in an ordinance as to repairing streets, etc., when it constructs and operates its road under a privilege granted by a municipal ordinance to run a road through its streets: *Columbus v. Street Railroad Co.*, 45 Ohio St. 98. But companies must be allowed reasonable time in which to restore highways: *Dallas etc. R'y Co. v. Able*, 72 Tex. 150; and the county is not discharged from its duty toward the highway because a railroad company fails to restore the highway as it should: *State ex rel. v. Putnam Co.*, 23 Fla. 632.

But private railway crossings must, as a general rule, be kept in repair by the land-owner: *Gulf etc. R'y Co. v. Ellis*, 70 Tex. 307; for the presumption is, that the company, when it secured its right of way, indemnified the adjacent land-owner for the expense of keeping up all private crossings necessary for his proper use of the adjoining premises: *Gulf etc. R'y Co. v. Row-*

land, 70 Tex. 298; nor, in absence of a statute, is the company required to maintain cattle-guards, etc., at a private crossing: *Pennsylvania Co. v. Spaulding*, 112 Ind. 47.

"ORDINARY CARE" DEFINED: *Dreher v. Fitchburg*, 22 Wis. 675; 99 Am. Dec. 91, and cases cited in note 96.

"ORDINARY PRUDENCE" DEFINED: *Bowen v. State*, 9 Baxt. 45; 40 Am. Rep. 71, and note 75-80.

ALLEN v. DE GROODT.

[98 MISSOURI, 159.]

RELATIONS BETWEEN TENANT FOR LIFE AND REMAINDERMEN are such that the tenant cannot deal to his advantage, and to their disadvantage, by buying in the lands under a trust deed made by a former owner, for the purpose of destroying their title, and acquiring an independent title of his own. A release of a right made to a particular tenant for life or in tail inures to the benefit of him or them in remainder.

ADVANCEMENT FOR CHILDREN OF TENANT FOR LIFE WILL BE PRESUMED TO HAVE BEEN INTENDED when their father is such tenant, and they are remaindermen, and he purchases the land at a sale thereof for taxes, or under a trust deed made by a former owner.

JUDGMENT IN A TAX SUIT AGAINST THE TENANT FOR LIFE does not bind the remaindermen, and a sale thereunder cannot divest their title.

STATUTE OF LIMITATIONS. — REMAINDERMEN CANNOT SUE FOR POSSESSION during the continuance of the life estate. Therefore, the statute of limitations cannot affect them until the termination of such estate.

W. G. Hammond, William E. Garvin, John M. Matson, and James P. Dawson, for the appellants.

D. A. Ball and W. O. Gray, for the respondents.

SHERWOOD, J. Ejectment for certain lots in the fifth addition to the city of Louisiana. Betty Parry is the common source of title, and the plaintiffs are the remaindermen in a conveyance made by Betty Parry in October, 1845, Marshall S. Allen, father of plaintiff J. J. Allen, being created life tenant by the same instrument. In 1843, Betty Parry had conveyed the land to McQuie, trustee, to secure a debt due McCune, amounting to \$1,270, under which deed it was afterwards sold, Marshall S. Allen, life tenant, being the purchaser, and receiving a deed for the premises in controversy. Years afterwards, in 1880, the land was sold for taxes, and the defendants claim through mesne conveyances, under the purchase at the tax sale. All the deeds aforesaid were duly recorded.

There are three prominent questions in this cause to be decided. The controlling questions thus referred to are these:

1. The effect of the sale under the deed of trust, the life tenant being the purchaser and recipient of the deed; 2. The effect of the tax proceedings and sale, the life tenant being the only party defendant to the tax judgment; and 3. Whether the three years' statute of limitation barred the plaintiffs of their action.

¶ 1. Marshall S. Allen, being the life tenant, occupied such relations towards the remaindermen that he could not deal to his own advantage, and to their disadvantage, by buying in the land under the trust deed, and thereby defeat their title, and acquire an independent title of his own. "A release of a right made to a particular tenant for life or in tail shall aid or benefit him or them in the remainder": Co. Lit., secs. 453, 267 b.

Thus it has been ruled that if a tenant for life, after a sale of the property for taxes has occurred, obtains a release to himself of the right thus acquired, he takes under such release according to his title, and the remaindermen according to theirs: *Varney v. Stevens*, 22 Me. 331. And if a tenant for life buy in an outstanding encumbrance upon the estate, it will be presumed, nothing to the contrary thereof appearing, that the purchase was made for the benefit of the reversioner or remainderman, as well as himself: 1 Washburn on Real Property, 5th ed., 129; *Whitney v. Salter*, 36 Minn. 103; 1 Am. St. Rep. 656. And it is well-established law that if a life tenant renew a lease, or buy in an encumbrance or the like, the fealty which he owes to the remainderman will convert him into a trustee for the benefit of such remainderman: Bissett on Estates for Life, 248. Besides, inasmuch as the life tenant was the father of those who were to take in remainder at the time he bought in the land at the trustee's sale in 1850, it will be presumed that such purchase was intended as an advancement for his children. Such presumptions as to advancements are constantly indulged where deeds are made directly to children through funds furnished by their fathers, and a similar presumption may well be indulged here.

Taking the foregoing premises as true, whatever title the purchaser acquired at the tax sale did not extend beyond the life estate of Marshall S. Allen.

2. But there is another reason for announcing the same conclusion: The tax suit was brought against Marshall S. Allen alone; the remaindermen were not made parties. They did not claim under him, but by an independent title, one created

by the deed of Betty Parry; so that the judgment in the tax suit, in any event, bound only the life tenant, and not the remaindermen: *Troyer v. Wood*, 96 Mo. 478; 9 Am. St. Rep. 367; *Chamberlain v. Blodgett*, 96 Mo. 482.

3. Now, as to the possession of the defendants under the tax deed for the period of three years, it has been recently ruled by this court in *Bartlett v. Kauder*, 97 Mo. 356, that the short statute of limitations in reference to tax sales only applies to sales and deeds made under the old law by collectors.

4. Moreover, the statute of limitations cannot apply in this cause, for another reason: service of process herein was had February 16, 1884; Marshall S. Allen died in March, 1881; so that at the time of this ejectment brought, said Allen had not been dead for three years; and in general, the remaindermen cannot sue for possession during the continuance of the life estate: 1 Washburn on Real Property, 5th ed., 132.

For these reasons, the judgment will be reversed, and the cause remanded, with directions to the trial court to enter a judgment for plaintiffs.

On motion, the judgment was so modified that the cause was remanded for new trial.

REVERSIONERS AND REMAINDERMAN. — IN DETERMINING THE RIGHTS AND REMEDIES of a reversioner or remainderman, the best guide is to consider the nature of his estate and that of the tenant for life, or of the other particular estate, which must terminate before the reversioner or remainderman can come rightfully into the possession of the property. As a general rule, the tenant and the reversioner or remainderman are not at the same time entitled to the same right or remedy. Almost universally a tenant of the particular estate has the right to its possession, and the possession to which he is so entitled is not a formal one merely, but carries with it the right to the beneficial enjoyment of the property. If it is clear from the instrument creating the two estates that the owner of the particular estate is entitled to be in the possession and use thereof, it may be that such possession and use will result in the entire extinction of the subject-matter of the estate, and thus wholly defeat the rights of the reversioner or remainderman. If the subject-matter is personal property, and the tenant is entitled to its use, he has a right to use and enjoy it according to its nature, though this use may result in its total consumption: *Majors v. Herndon*, 78 Ky. 128; *Woods v. Sullivan*, 1 Swan, 507; *German v. German*, 27 Pa. St. 116; 67 Am. Dec. 451. On the other hand, if the property is not such as is consumable in its ordinary use, the only right which the reversioner or remainderman has is the right to have property forthcoming at the termination of the particular estate.

A tenant for life of personal property has no right to carry it beyond the jurisdiction of the court, unless, perhaps, upon giving adequate security for its return, when the remainderman or reversioner shall become entitled thereto: *Braswell v. Morehead*, Busb. Eq. 26; 57 Am. Dec. 587. Formerly

it was the practice to exact from the tenant for life security for the protection of the remainderman. This security is still required in exceptional circumstances. But unless the remainderman can show some necessity for exacting security, the only remedy which he now has is to require the tenant to make an inventory which shall show the property which he received, and to which the remainderman will become entitled upon the termination of the particular estate: *Pierce v. Stedworthy*, 81 Me. 50; *Westcot v. Cady*, 5 Johns. Ch. 334; 9 Am. Dec. 306; *Covenhoven v. Shuler*, 2 Paige, 122; 21 Am. Dec. 73; *Bentley v. Long*, 1 Strob. Eq. 43; 47 Am. Dec. 523; *Rowe's Ex'r v. White*, 16 N. J. Eq. 411; 84 Am. Dec. 169; *Smith v. Daniel*, 2 McCord's Ch. 143; 16 Am. Dec. 641; note to *Braswell v. Morehead*, 57 Am. Dec. 587. From the fact that the tenant is entitled to the possession of the property, it necessarily follows that the reversioner or remainderman is not, and that the latter cannot successfully resort to any remedy to the maintenance of which an immediate right of possession is essential, and he can be in no default for not having resorted to such a remedy, when a resort to it manifestly would have been unavailing.

Trespass, trover, ejectment, and like actions, seeking either to recover the possession of the property or to obtain compensation for injuries to the possession, cannot be maintained by the reversioner or remainderman, because he has no right of possession, and can therefore suffer no injury from the detention of possession by another. The fact that the tenant of the particular estate may have undertaken to convey the whole property, while it indicates an intention upon the part of his grantee to receive and hold the property under a claim to the whole thereof in fee, does not confer any right of possession upon the reversioner or remainderman, nor entitle him to maintain any action to the maintenance of which right of possession is essential: *Lewis v. Mobley*, 4 Dev. & B. 323; 34 Am. Dec. 379; *Steele v. Williams*, Dud. (S. C.) 16; 31 Am. Dec. 546; *Pendley v. Madison*, 83 Ala. 484; *Jackson v. Mancius*, 2 Wend. 357. If a conveyance or transfer made by the tenant entitles the remainderman or reversioner to the forfeiture of the tenant's estate, the rule is the same, unless the person entitled to such forfeiture elects to enforce it. For it is well settled that a remainderman or reversioner may waive a forfeiture incurred by the tenant, and that such waiver is presumed, in the absence of evidence to the contrary. Therefore, notwithstanding the existence of a cause of forfeiture, the reversioner or remainderman will be deemed to have a right of possession, commencing at the death of the life tenant, or at any other termination of the particular estate, unless it is shown that a forfeiture occurring before that period has been asserted and enforced: *Miller v. Ewing*, 6 Cush. 34; *Tilson v. Thompson*, 10 Pick. 357; *Stevens v. Winslip*, 1 Id. 318; 11 Am. Dec. 178; *Wells v. Prior*, 9 Mass. 508; *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629; *Doe v. Danvers*, 7 East, 321.

Every reversioner or remainderman rightfully expects that upon the termination of the particular estate he will become seised in fee of the whole property, unimpaired by any wrongful act, either of the tenant or of any other person, and therefore is entitled to the aid of the courts to prevent any threatened wrong which will impair the value of the estate when it shall come into his possession, or to recover compensation for such wrong if already consummated. In other words, a reversioner or remainderman may maintain an action for any injury to the inheritance, whether committed by a stranger or by the tenant in possession: *Queen's College v. Hallett*, 14 East, 489; *Jesser v. Gifford*, 4 Burr. 2141; *Young v. Spencer*, 5 Man. & R. 47; 10 Barn. & C. 145.

Many of the acts resulting in injuries to the inheritance are also injurious to the tenant in possession. Where this is the case, each of the parties injured may maintain a separate action to recover compensation for the injuries suffered by him. "A tenant and reversioner may each maintain his action for the selfsame act, and each may recover for the injury he sustained by reason thereof. The defendant is not thereby compelled to respond in damages twice for the same injuries, but simply to compensate each of the parties injured for the consequence of his tortious act: *Tinsman v. Belvidere etc. R. R.*, 25 N. J. L. 255; 64 Am. Dec. 415.

The erection and maintenance of a nuisance of a permanent character furnishes a familiar illustration of an injury both to the freehold and to the tenant in possession. Hence both the owner of the estate in possession and the owner of the estate in reversion or remainder have a cause of action for the abatement of the nuisance or the recovery of damages suffered thereby. The difficulty is in determining when a nuisance is in legal contemplation permanent; for while the decisions assert that a reversioner cannot maintain an action for a private nuisance unless the injury therefrom is permanent (*Munford v. O. W. & W. R'y Co.*, 1 Har. & N. 34; 25 L. J. Ex. 265; *Mott v. Shoolbred*, 44 L. J. Ch. 380; L. R. 20 Eq. 22; 23 Week. Rep. 545; *Jones v. Chappell*, 44 L. J. Ch. 658; L. R. 20 Eq. 539; *Baxter v. Taylor*, 1 Nev. & M. 14; 4 Barn. & Ad. 72), they do not, or at least most of them do not, mean that relief must be denied in all cases in which it does not appear that a nuisance and the consequent injury must inevitably continue beyond the termination of the particular estate. No generally accepted definition of a permanent nuisance has as yet been formulated, and the decisions upon this subject are unquestionably irreconcilable. On the one side, it has been held that causing smoke to issue from a chimney, though it results in the tenant giving notice of his intention to quit, will not sustain an action by a reversioner, unless the erection of the chimney is in itself a nuisance: *Simpson v. Savage*, 1 Com. B., N. S., 347; 3 Jur., N. S., 161; 26 L. J. Com. P. 50; and that no action lies in favor of the reversioner for fixing barges and planks in a river, and thereby obstructing its use and navigation, and hindering the unloading of boats: *Dobson v. Blackmore*, 9 Q. R. 991; 11 Jur. 55; 16 L. J. Q. B. 233. The case last cited cannot, we apprehend, be sustained, unless upon the assumption that the manner of fixing the barges and planks was such as to indicate an intention to use them temporarily only. In *Tinsman v. Belvidere etc. R. R.*, 25 N. J. L. 255, 64 Am. Dec. 415, it was adjudged that the plaintiff could maintain an action to recover damages for injuries to his reversionary interest in certain real estate when such injuries consisted in the construction of an embankment of lumber, stone, and earth in the mouth of a creek, so that rafts could not be landed nor lumber stored for the use of the plaintiff's mill in as safe and secure a manner as his tenants had been accustomed and had a right to do.

As far as any general rule can be formulated upon the subject now under consideration, it is this: that if the obstruction or other nuisance complained of appears to be of a permanent nature in its construction, so that the plaintiff's reversionary interest might be lowered in public estimation, and loss might follow, he can sustain his action; and "where the erection complained of is the immediate cause of injury to the possession, and, without further interference by the act of man, would in the ordinary course of things continue to be so on the determination of the tenancy, the reversioner has a right of action, on the ground that the encroachment on the inheritance may by lapse of time ripen into a right, where the reversioner has notice or knowl-

edge of it": *Tinsman v. Belvidere etc. R. R.*, 25 N. J. L. 255; 64 Am. Dec. 415; citing *Bower v. Hill*, 1 Bing. N. C. 549.

The following encroachments upon real estate fall within the rule as just stated, and entitle the reversioner or remainderman to appropriate relief: The erection of a dam by a lower proprietor, whereby the water of a stream is so backed up as to clog the plaintiff's mill: *Ripka v. Sergeant*, 7 Watts & S. 9; 42 Am. Dec. 214; the maintenance of a ditch, whereby water is diverted from a natural stream running through the land, and the fertility of the land is diminished: *Heilbron v. Last Chance W. D. Co.*, 75 Cal. 117; *Hart v. Evans*, 8 Pa. St. 14; fastening a gate across a right of way to which the reversioner and his tenants are entitled: *Kidgell v. Moore*, 1 Lown. M. & P. 131; 9 Com. B. 364; 14 Jur. 790; 19 L. J. Com. P. 177; the erection of a house so that the eaves and a pipe therefrom conduct water upon the lands of the plaintiff: *Tucker v. Newman*, 3 Perry & D. 14; Ad. & E. 40; 3 Jur. 1145. It is never a sufficient answer to an action by a reversioner that the cause of injury may possibly be removed and the damages abated before the termination of the estate in possession: *Shadwell v. Hutchinson*, Moody & M. 350; 4 Car. & P. 333; *Metropolitan Ass'n v. Petch*, 4 Jur., N. S., 1000; 27 L. J. Com. P. 330; 5 Com. B., N. S., 504. "An action will lie by the reversioner for erecting a wall whereby the plaintiff's lights are obstructed: *Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown*, Sayers, 215; for obstructing the flue of a chimney, thereby rendering the room unfit for habitation: 2 Chitty's Pleading, 778; for diverting a stream of water, whereby the soil was impoverished: *Id.* 794; for throwing back water upon the land, so that it was rendered boggy and miry: *Potts v. Clarke*, 20 N. J. L. 536; for obstructing a way, whereby the enjoyment of the premises is rendered inconvenient: 2 Chitty's Pleading, 810. In all these cases it is apparent that by possibility the cause of the injury may be removed before the estate of the tenant for years determines; yet while the nuisance or cause of complaint is continued, the premises are diminished in value, and the present value of the reversion is consequently diminished. The estate of the reversioner would sell for less. The law, therefore, regards him as sustaining an injury. And if the inheritance is in fact diminished in value, the reversioner may maintain an action for the injury, though there may have been no diminution in the amount of the rent, and no loss by a sale of the premises at a depreciated price. In *Shaulicell v. Hutchinson*, 3 Car. & P. 615, the action was brought by the reversioner for obstructing an ancient light by erecting a roof over an uncovered space above the window, by means whereof the room was darkened and rendered close, uncomfortable, unwholesome, and unfit for habitation. It was proved that the obstruction might be easily removed in the course of two or three days: Lord Tenterden said: "I have no doubt that this is a case in which the reversioner may maintain an action, because it is an injury to the right that he complains of; and the effect of letting the obstruction stand might be that, from the death of witnesses, evidence of its erection might be lost, and so the injury would become permanent." The plaintiff recovered nominal damages, one shilling.

A reversioner or remainderman must submit to the exercise by the tenant in possession of his right to estovers. The nature and extent of this right have been considered in the note to *Miles v. Miles*, 64 Am. Dec. 367, and will not be here discussed. The tenant for life has also the right to emblements, by which is meant the right of taking the profit of growing crops during his life, and the right of his representative to take such crops when the estate has terminated by his death, after such crops were sown and before they could be har-

vested. This right to emblements exists also in the lessees or under-tenants of the tenant for life; nor can the right of a lessee of a tenant for life be successfully denied on the ground that he sowed the crop when he had reason to believe that the tenant for life was near his death, and could not survive until the harvest: *Bradley v. Bailey*, 57 Conn. 374.

Waste is "a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail." We shall not here undertake to specify the many acts which have been adjudged to fall within the above definition. It suffices our present purpose to state that for each of such acts, whether committed by a stranger, by a tenant in possession, or by one claiming the right to do so by permission of the latter, the reversioner or remainderman is entitled to an appropriate remedy, either to restrain the commission of such acts when threatened, or to recover compensation for them if consummated: 1 Washburn on Real Estate, 116-121; *Coleman v. Steere*, 1 R. L. 272; 53 Am. Dec. 621; *Pyncheon v. Stearns*, 11 Met. 304; 45 Am. Dec. 207; *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362; *Dupee v. Dupee*, 4 Jones, 387; 69 Am. Dec. 757; *Dorey v. Moore*, 100 N. C. 41; *Raine v. Alderson*, 4 Bing. N. C. 702; 6 Scott, 691; Arnold, 329; *Simpson v. Bowden*, 33 Me. 549.

If the waste committed consists in the cutting of trees, or any other complete severance of any part of the realty, the trees or other realty so severed thereupon become personal property, in which the tenant in possession has no title or interest; and the reversioner may therefore maintain his action for the possession of the property so severed, or for damages resulting from its being taken and carried away, or otherwise converted, in the same manner and with like effect as if he were the owner of an estate in possession: *Lane v. Thompson*, 43 N. H. 320; *Elliott v. Smith*, 2 Id. 430; *Richardson v. York*, 14 Me. 216; *Paget's Case*, 5 Coke, 77; *Ward v. Anderson*, 2 Chit. 636.

A tenant in possession has no authority, as such, to represent the reversioner, or to bind him or his estate in any manner whatever. Neither can the tenant impose any obligation or liability upon the estate to be enforced against it when it comes into the possession of the reversioner. If the tenant has made improvements which remain on the property at the termination of his estate, he cannot recover the value thereof, nor can he treat such value as a lien or charge against the estate: *Thurston v. Dickinson*, 2 Rich. Eq. 317; 46 Am. Dec. 56. If a forfeiture is incurred by a tenant for life, its consequences must be restricted to his estate, and not extended so as to impair the rights of the reversioner: *Archer v. Jones*, 26 Miss. 583. Generally, the reversioner and the tenant in possession are not regarded as in privity with each other. When the reversioner comes into the possession of the estate, he does not come as one claiming under or receiving from the tenant, but rather as one possessing a paramount title. Hence the admissions or declarations of a tenant are not ordinarily admissible against a reversioner or remainderman: *Pool v. Morris*, 29 Ga. 374; 74 Am. Dec. 68; *Papendick v. Bridgewater*, 24 L. J. Q. B. 289; 5 El. & B. 166. Upon the same principle, a judgment entered for or against a tenant in possession ought not to be admissible in evidence for or against a reversioner or a remainderman. And this we deem to be the rule best supported both by reason and authority, though there are doubtless some exceptions to it, which we have considered elsewhere: Note to *Redmond v. Collins*, 27 Am. Dec. 223; Freeman on Judgments, sec. 172.

As a tenant cannot impair the rights of the reversioner by his direct admission or declaration, neither can he accomplish the same result by his

inaction or his failure to enforce any right to which he is entitled. Some stranger to the title may dispossess the tenant of the whole property, or may assert and maintain an easement with respect to some part thereof, and may thereby obtain a prescriptive title, as against the tenant, either to the whole property or to the easement enjoyed. This, however, will not affect the reversioner or remainderman, and his cause of action to recover possession of the property will be treated as commencing only upon the termination of the preceding estate: *Miller v. Ewing*, 6 Cush. 34; *Salmons v. Davis*, 29 Mo. 176; *Jackson v. Manlius*, 2 Wend. 357; *Guion v. Anderson*, 8 Humph. 325; *McCorry v. King's Heirs*, 3 Humph. 367; 39 Am. Dec. 165; *Foster v. Marshall*, 22 N. H. 491; *Bradbury v. Grimsell*, 2 Wms. Saund. 175 d; *Pierre v. Fernald*, 26 Me. 440; 46 Am. Dec. 573; *Daniel v. North*, 11 East, 370; *Sargent v. Ballard*, 9 Pick. 251.

Where profits result from property in which there is an estate in reversion or remainder, and also an estate in possession, they follow the right of possession, and go to the person who is entitled to the possession at the time when they accrued or became due. If the property has been rented, and rents have become payable during the continuance of the particular estate, they belong to the tenant, but those rents which do not fall due until after its termination belong to the reversioner, though the occupation of the lessee was during the existence of the particular estate, unless some statute has been enacted requiring a division of the rents between the tenant and the reversioner under such circumstances: *Stafford v. Westworth*, 1 P. Wms. 180; *Norris v. Harrison*, 2 Madd. 268. If the subject-matter of the estate in possession and that in reversion or remainder is live-stock, its increase is regarded as profits, to which the owner of the estate in possession is entitled: *Lewis v. Davis*, 3 Mo. 133; 23 Am. Dec. 698; *Garth v. Everett*, 16 Mo. 492.

With respect to the capital stock of corporations, there is at times difficulty in determining whether a particular dividend is the representative of profits earned by the corporation or of pre-existing corporate assets. If a dividend is payable in cash, and represents profits, there is no doubt that it belongs to the tenant for life: *Minot v. Paine*, 91 Mass. 101; 96 Am. Dec. 705; note to *Goodwin v. Hardy*, 99 Am. Dec. 765; *Richardson v. Richardson*, 75 Me. 570; 46 Am. Dec. 428; *Millen v. Guerrard*, 67 Ga. 284; 44 Am. Rep. 720. If, on the other hand, the dividend is merely the result of pre-existing capital of the corporation, as where a part of its property is taken in the exercise of the right of eminent domain, and the moneys received therefor are distributed as dividends to the other holders, such dividends belong to the reversioner or remainderman: *Heard v. Eldridge*, 109 Mass. 258; 12 Am. Rep. 687; *Rand v. Hubbell*, 115 Mass. 461; 15 Am. Rep. 121. With respect to stock dividends, the adjudications are not entirely reconcilable. There is a general tendency to treat such dividends as pre-existing assets or capital of the corporation, and not as profits, and therefore as belonging to the reversioner or remainderman rather than to the tenant for life. In Massachusetts, and perhaps elsewhere, the courts will not enter upon an original inquiry for the purpose of ascertaining the source of such dividends, but will consider the resolution and proceedings of the corporation to determine whether it and its trustees regarded an extraordinary dividend in question as profits or as capital, and will treat it accordingly. If it appears that the corporation declared the dividend as profits, it belongs to the owner of the life estate, and if, on the other hand, the corporation was apparently merely making an increase in its capital stock to adequately represent pre-existing assets, the remainderman is entitled to such increase: *Gibbons v. Mahon*, 4 Mackey, 130;

54 Am. Rep. 262; *Vinton's Appeal*, 99 Pa. St. 434; 44 Am. Rep. 116; *Mint v. Paine*, 91 Mass. 101; 96 Am. Dec. 705; *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164, and note; *Brander v. Brander*, 4 Vos. 801; *Preston v. Metville*, 16 Sim. 163; *Hooper v. Rossiter*, 13 Price, 774; *Rand v. Hubbell*, 115 Mass. 461; 15 Am. Rep. 121; *Petition of Brown*, 14 R. I. 371; 51 Am. Rep. 397.

✱ If the property is subject to an encumbrance which is paramount to the estate both of the reversioner or remainderman and of the tenant in possession, the latter, being entitled to the rents and profits of the property, may be required to pay out of them the current interest as it falls due: *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318; *Squire v. Compton*, 2 Eq. Cas. Abr. 387; *Bell v. Mayor*, 10 Paige, 49; and thus to keep the amount of the encumbrance from increasing; but he cannot be required to pay off the principal, in whole or in part, and thus relieve the estate of the reversioner or remainderman: *Smith v. Barnham*, 2 Dev. Eq. 420; 25 Am. Dec. 721. If the encumbrance is one which the remainderman or reversioner has been compelled to discharge, he is entitled to contribution from the tenant for life. This contribution may consist either in the payment by the tenant during the continuance of his estate of an amount equivalent to the interest upon the sum paid by the remainderman, or, if that be inconvenient or embarrassing to the tenant, the amount to be paid may be ascertained by estimating what would be the value of an annuity equivalent to the amount of such interest, payable for the life of the tenant; and in making this determination, his age and health will be considered: *Swaine v. Perine*, 5 Johns. Ch. 490; 9 Am. Dec. 318; *Gibson v. Crahoe*, 5 Pick. 146; *Houghton v. Hapgood*, 13 Id. 154; *Foster v. Hillard*, 1 Story, 77; *Carll v. Butman*, 7 Me. 102; *Jones v. Sharrard*, 2 Dev. & B. Eq. 179, 189.

→ When, upon the termination of a life or other estate which entitles its owner to the possession of the property, the reversioner or remainderman becomes vested with an estate giving him a right to such possession, he will naturally meet with reluctance upon the part of the persons in possession to yield it to him. If possible, they will interpose a claim that his estate has been extinguished by prescription, or by his laches, or by any other mode which their ingenuity or that of their counsel can suggest. It is a general rule, well supported both by reason and authority, that no one can be in default in not bringing an action which it was impossible for him to have maintained if brought, and that no statute of limitations can commence running until the period arrives when the person claiming title or right of possession can successfully vindicate his claim and right by some appropriate action. When, therefore, one who has been a reversioner or remainderman becomes entitled to the possession of the property by the termination of a preceding estate in possession, and he brings his action to enforce his right, and is met with a plea of prescription or laches, the proper inquiry is, whether the action which he thus brings could have been commenced and maintained by him at any period anterior to its actual commencement; and if so, the statute must be regarded as operating from and after such period. If, after that period, the full time required by the statute of limitations has interposed, he should be regarded as barred. Otherwise, his right must be regarded as still intact and irresistible, however long continued the delay has been. To this rule there appears to be an exception, arising in the cases in which the tenant in possession has been guilty of some act or default for which the reversioner or remainderman might have elected to terminate the estate in possession. In such cases, while the reversioner may so elect, and, upon such election, maintain an appropriate action to recover possession, he

may also waive the forfeiture; and if he does waive it, he is regarded as obtaining a new right of possession upon the death of the life tenant, or other termination of the particular estate; and the statute of limitations will not be allowed to commence its operation until the happening of the latter event: *Miller v. Ewing*, 6 Cush. 34; *Tilson v. Thompson*, 10 Pick. 339; *Stevens v. Winship*, 1 Id. 318; 11 Am. Dec. 178; *Wells v. Prince*, 9 Mass. 509; *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629; *Doe v. Danvers*, 7 East, 321.

If an act is done or threatened which constitutes an injury to the inheritance, the reversioner or remainderman is, as we have before shown, entitled to redress in the courts, either preventive or compensatory, as where the flow of a stream of water is obstructed, or its waters are diverted and taken away to moisten and fertilize other land. Though the present damages to the reversion are nominal, the reversioner's right of action is sustained, on the ground that the wrong, if sufficiently long continued, may ripen into a prescriptive right: *Schnable v. Koehler*, 28 Pa. St. 181; *Woodbury v. Willis*, 50 Me. 403; *Land v. New Bedford*, 121 Mass. 286; *Hastings v. Livermore*, 7 Gray, 194; *Potts v. Clarke*, 20 N. J. L. 536. Hence it has been held that a landlord failing to bring an action to enjoin the diversion of water from a stream running through his lands may, in time, lose his right of action, and thus invest the diverter with a right to continue the diversion: *Heilbron v. Water Ditch Co.*, 75 Cal. 117.

The possession of the tenant for life is never deemed adverse to the reversioner or remainderman: *Groat v. Townsend*, 2 Hill, 554; *Austin v. Stevens*, 24 Me. 526; *Varney v. Stevens*, 22 Id. 334. The protection of the latter is not limited to a mere presumption that the possession is not adverse to him; it cannot by any possibility become adverse, for the reason that such possession is not an interference with his rights. The tenant cannot make his possession adverse, though he denies that any one has any estate in reversion or remainder, and proclaims that he is the owner of the fee. "There is no one to sue, no matter how often or how openly and loudly such tenant may claim to be an absolute proprietor; for the person in reversion or remainder concedes the right of possession for life, and cannot therefore dispute it": *Salmons v. Davis*, 29 Mo. 176. Hence it follows that the statute of limitations does not run against any possessory action in favor of a reversioner or remainderman until the extinguishment of the estate of the tenant for life: *Fogal v. Pirro*, 10 Bosw. 113; *Jackson v. Selleck*, 8 Johns. 262; *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433.

As a tenant for life can by no means put the statute of limitation in motion in his own favor, neither can he put it in motion in favor of his grantee or any other person. He may sell the property to one who supposes him to have an estate in fee, and may make a conveyance appropriate to the transfer of the fee. His grantor may enter into possession under such conveyance in good faith, believing himself to have thereby acquired an estate in fee. Nevertheless, his possession is not and cannot be adverse to the reversioner or remainderman as long as the latter has no right to the possession of the property: *Pickett v. Pope*, 74 Ala. 122; *Thrasher v. Ingram*, 32 Id. 646; *Pendley v. Madison*, 83 Id. 484; *Mellers v. Snowman*, 21 Me. 201; *Jackson v. Mancina*, 2 Wend. 357; *Stevens v. Winship*, 1 Pick. 317; 11 Am. Dec. 178. If the person on the continuance of whose life the estate in possession depends dies, and the reversioner or remainderman thereby becomes entitled to the possession, from that moment, and not before, the possession attains the characteristics and incidents of an adverse possession: *Barrett v. Stradi*, 73

Wis. 385; 9 Am. St. Rep. 795; *Mettler v. Miller*, 129 Ill. 630; *Constantine v. Van Winkle*, 6 Hill, 177.

While the rule that the possession of a tenant for life is not adverse to the remainderman or reversioner has never been repudiated in express terms, many attempts have been made to evade its logical consequences by urging that some presumption should be indulged from the fact that those in possession have been so long undisturbed. In Alabama, some of these attempts have apparently met with success, though no courts have more clearly than those of that state asserted the general rule that the possession of the tenant for life cannot be adverse to the remainderman or reversioner. The first departures from the true rule were in cases where the execution of powers of sale were in question, and the court indulged the presumption of the legality of the execution of such powers, though there were persons otherwise entitled to estates in reversion or remainder: *Matthews v. McDade*, 72 Ala. 377; *Gosson v. Ladd*, 77 Id. 223; *Kelly v. Hancock*, 75 Id. 229; *Long v. Palmer*, 81 Id. 384. In *Woodstock Iron Co. v. Fullenwider*, 87 Id. 584, 13 Am. St. Rep. 73, the action was ejectment by the heirs at law of one Samuel Hudson. The widow of Hudson had owned a life estate in the premises based on the allotment to her of her right of dower. A sale of the property was made in probate by the administrator of Hudson for the payment of the latter's debts, under which the widow became the purchaser, and supposed she had acquired the reversioner's estate in the land. She paid the purchase-money, and it was used in the payment of the debts of the estate. The widow did not die until the year 1879, which was less than ten years before the action was brought. She and her successors in interest had been in the continued, exclusive, and open possession of the property under a claim of the ownership thereof in fee, from the sale up to the time of the commencement of the action. The heirs contended that the sale in probate was void, and conveyed no title to the purchaser. The legality of the sale was apparently not insisted upon by the defendants, who contented themselves with urging that all irregularities in the sale and defects in the title were cured by the presumption arising from their long possession. The court conceded that the plaintiffs had no right to sue in ejectment until after the death of the widow, who was the tenant for life, and that her possession, so far, at least, as concerned the legal title in reversion, was not hostile to the heirs during the continuance of the particular estate. The opinion of the court appears to rest upon two grounds. The first and most defensible was, that where the lands of a decedent are sold by the probate court for the payment of his debts, and the purchase-money is properly applied by the administrator, that while the sale is so far void as to convey no title at law, "the purchaser, nevertheless, acquires an equitable title to the lands, which will be recognized in a court of equity, and he may resort to a court of equity to compel the heirs and devisees to elect a ratification or rescission of the contract of purchase, and that they are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase-money." The second ground was, that as the deed and other proceedings were of a character to be used to injuriously affect the plaintiffs' title and impair its market value, and plaintiffs had a right to resort to equity to have the objectionable proceedings vacated as a cloud on their title, and that as in order to successfully maintain such proceedings they must tender to the purchaser the amount paid at the sale, the failure to exercise such right for over twenty years is such laches as authorizes the inference that the right to do so is barred in any one of the modes in which that result may be effected, and that, finally, the "fair

legal presumption arising from this state of facts is, that the purchaser, or those claiming title under her, have filed a bill in equity compelling the heirs of Hudson to convey to them the legal title, or else that a voluntary conveyance of such title has been made by such heirs, thereby converting the equitable into the legal title."

It is manifest, however, that the decision in this case does not necessarily affirm that, in ordinary circumstances, any presumption must be indulged that the reversioner or remainderman has conveyed his estate to the tenant in possession. If such a presumption necessarily arises from the long continued and rightful possession of the tenant for life, then the whole beneficial results of the rule that the possession of the tenant for life is not adverse must be destroyed. It is evident that the court regarded the purchasers at the probate sale in question as invested thereby, and by the payment of the purchase-money, with an equitable title in the property, and the right to be in its possession and to call for the conveyance of the legal title, unless the reversioners should, within a reasonable time, elect to disaffirm the sale which had been made, and the proceeds of which had been applied to the extinguishment of debts for which their estate was answerable. If it be the law of Alabama that one whose estate has been the subject of a void sale in probate, the purchase-money of which has been applied for his benefit, must offer to repay the purchaser before he can assert a title to the premises, then, in our judgment, the decision is undoubtedly right; otherwise it is manifestly wrong. The fact that the reversioner did not pursue his remedy to remove a cloud from his title appears to us to be immaterial. It has always been the law that any one might resort to a court of equity to remove an apparent cloud upon his title, and statutes are now in force in many of the states under the provisions of which one may call upon any one asserting an adverse claim to his property to litigate such claim, and to submit it to judicial determination. If persons holding estates in remainder or reversion, and therefore not entitled to the immediate possession of the property, must exercise the right thus conceded to them in equity or by these statutes, or be met with a presumption that every conflicting claim accompanied by the possession is valid, these rights of action operate as so many snares. These equitable remedies, by which one claiming an estate or interest in land may appeal to the courts to determine it, were designed for his protection, rather than his destruction, and the fact that he does not resort to them ought not to be regarded as an irrevocable abandonment of those remedies to which he is otherwise entitled.

In the leading case in which it was sought to establish a presumption as against a reversioner or remainderman in favor of persons in possession, the existence of the presumption was denied, and the reasons for such denial were given as follows: "It is insisted that the jury should have been instructed that they might presume from the length of possession in this case that the wife had properly conveyed; that her ancestor, the testator, had made a deed, or the state issued an older grant to the defendant below, or to those under whom he claims. We are of opinion that the judge of the circuit court presiding at the trial very properly withheld such instruction. Where the circumstances of the case, the relation of the parties toward each other, or the condition of the title obviate and repel the bar of the statute, we think it would be wrong in principle and unsupported by precedent to protect the possession by giving effect to the doctrine of presumption insisted on. It would operate, moreover, most unjustly. A tenant in dower might alien in fee, and live for sixty or seventy years afterwards. The heir could not enter or sue during her life, and the statute would not operate in

favor of the alienee until seven years had elapsed after the death of the tenant in dower. Yet if the doctrine of presumption was applied to the case, the alienee would have a good title in fee, not by the deed he had taken, but by another presumed in his favor for more than twenty years before the death of the dowress. The truth is, the doctrine of presumption, as well as the bar created by the policy of the statute, is founded upon the principle of laches in him who, having the right, power, and capacity to sue and disturb or recover possession, for a long time omits and neglects to do so. This doctrine, under such circumstances, to secure the repose of society, presumes at length that he who could and would not sue had parted with his right. But to presume against him who is unable to sue, whose right of action has not accrued, who has been guilty of no laches, that his title has passed from him, or from those under whom he claims, would be an application of the doctrine of presumption as novel, we think, as it would be mischievous": *McCorry v. King's Heirs*, 3 Humph. 267; 39 Am. Dec. 173. When a similar question arose in the more recent case of *Mettler v. Miller*, 129 Ill. 630, it met with similar response: "All statutes of limitation," said the court, "are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced would be subversive of justice, and would be to deprive such person of his estate without his day in court." *Jewett v. Jewett*, 10 Gray, 31, *Ortwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, *Lamar v. Pearre*, 82 Ga. 354, *ante*, p. 168, *Keller v. Stanley*, 86 Ky. 240, are cases also in harmony with these quotations, and in spirit, at least, irreconcilable with the decisions referred to made by the supreme court of Alabama. In the last-named case it was determined that the right of a reversioner to maintain a suit to quiet his title could not be barred during the continuance of the particular estate, no matter how long a period of time had elapsed after the assertion of the adverse claim.

The law will not permit the tenant of the particular estate to occupy an attitude of hostility toward a remainderman. In the case of landlord and tenant, the relation arises out of an express contract to which both are parties, and every such contract is attended with an implied condition that the tenant and those claiming under him will restore the property to the landlord or his successor in interest, at the termination of the lease, unimpaired by any willful act. The tenant must restore the property before he can assert any adverse title to it. He will not be permitted to obtain possession by virtue of his lease, and then to deny his landlord's title, and hold the property after the expiration of the lease under a claim that the landlord was not the owner nor entitled to the possession when the lease was made. This rule operates against a tenant for life, or of any other particular estate, with like force as though he were a tenant for years only: *Caufman v. Presbyterian Congregation*, 6 Binn. 59.

It is obvious that if it is the tenant's duty to pay taxes, or to discharge any other encumbrance, he cannot, by either willfully or inadvertently neglecting the duty, acquire the title of the remainderman at a tax or other sale, resorted to for the purpose of coercing the payment of the tax or other lien: *Varney v. Stevens*, 22 Me. 334; *Stewart v. Mutheny*, 66 Miss. 21; *ante*, p. 538. Even if the encumbrance is one which it is the duty of the remainderman to discharge in whole or in part, the tenant of the particular estate will not ordinarily be permitted to acquire an absolute title by purchasing at a sale based upon such encumbrance. Should he purchase at such a sale, or buy up an adverse title, the law will convert him into an involuntary trustee, and

require him to convey to the remainderman upon such terms as may be equitable. "The established doctrine is, that a tenant for life in possession, in the purchase of an encumbrance upon or an adverse title to the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold for his own exclusive benefit, if the reversioner will contribute his share of the sum paid. If the life tenant in such case pays more than his proportionate share, he simply becomes a creditor of the estate for that amount": *Whitney v. Satter*, 36 Minn. 103; 1 Am. St. Rep. 656; *Varney v. Stevens*, 22 Me. 331; *Davies v. Myers*, 13 B. Mon. 511.

MABARY v. DOLLARHIDE.

[93 MISSOURI, 193.]

PURCHASE OF LAND BY AN ADMINISTRATOR UNDER A JUDGMENT IN HIS FAVOR AS SUCH ADMINISTRATOR vests him with title to the property purchased as an individual, to be by him held in trust for the heirs and creditors of the estate.

STATUTE OF LIMITATIONS. — POSSESSION OF LAND BY ONE HOLDING UNDER A CONTRACT for its purchase is the possession of his vendor, and is available by the latter in making out statutory period of limitation.

STATUTE OF LIMITATIONS. — POSSESSION, TO BE OF ANY AVAIL UNDER THE STATUTE OF LIMITATIONS, MUST BE ADVERSE as well as continuous.

ADVERSE POSSESSION. — JUDGMENT IN EJECTMENT, not followed by any writ, nor by taking possession under it, does not suspend nor interrupt the running of the statute of limitations. Nor will the effect of the judgment be changed in this respect by the fact that an appeal was taken therefrom to the supreme court, where it was voluntarily dismissed by the defendants. If, however, the defendants, by parol or otherwise, consented to abide the judgment for possession, the effect is the same as if they had been turned out by a writ issued upon it, and had thereupon become tenants of the plaintiff.

Amos S. Smith, for the appellants.

Ross and Rechow, for the respondents.

BLACK, J. This is an action of ejectment for 120 acres of land in Hickory County. The suit was commenced in April, 1883, and the plaintiffs and appellants are the heirs of John Mabary, deceased. The title is conceded to have been in A. H. Foster.

James R. Wilson, as administrator of the Mabary estate, sued Foster for a debt due the estate, and caused the land to be attached in June, 1864. It was sold under a judgment recovered in that suit, and Wilson became the purchaser, taking the deed to himself as administrator. The sale was made in September, 1865, and the deed is dated August, 1867. Wilson, by a quitclaim deed, conveyed to these plaintiffs in

March, 1866. Wilson inventoried the property thus purchased as the property of the estate; and pursuant to an order of the probate court, made in October, 1868, sold the land for the purpose of paying the debts of the estate, and McClurg became the purchaser, and received an administrator's deed dated in August, 1869. McClurg purchased the same land in August, 1868, at a sheriff's sale, made under a judgment in another attachment suit brought by Wilson, as administrator of the Mabary estate, against Foster. Wilson and his wife made a deed of the land to McClurg in August, 1867.

The defendants in this suit put in evidence a sheriff's deed to the defendant Dollarhide, dated in 1864, and some tax deeds dated in 1866 and 1869. The sheriff's deed purports to convey the interest and title of Foster; but it and the tax deeds were excluded by the court. The sheriff's deed seems to be the same deed which was held to be of no validity in *McClurg v. Dollarhide*, 51 Mo. 347. This and the tax deeds were then read in evidence by the defendants for the sole purpose of showing color of title.

The evidence shows that Dollarhide took possession in 1865 or 1866, and that he went into possession under his deed dated in 1864. Bozarth took possession under Dollarhide, and after him the land was occupied by Rains, to whom Dollarhide made a title bond, dated in 1868. This title bond, it may be stated, included other land, and was made to Rains and Fisher. Rains remained in possession until 1881, but never completed the payment of the purchase-money, and hence never got a deed from Dollarhide.

On the 6th of November, 1873, McClurg brought a suit in ejectment against Rains to recover the land, to which suit Dollarhide was made a defendant on his own motion. McClurg obtained a judgment for the possession in November, 1875, and Rains and Dollarhide appealed to this court, but the appeal was dismissed, at their request, in 1878. It seems a writ for the possession of the land was never issued on this judgment.

Whilst this suit of ejectment of McClurg against Rains and Dollarhide was pending, the plaintiffs in this present suit commenced a suit in equity against McClurg to set aside the several deeds to him, on the ground that they had been procured by a fraudulent combination with Wilson, the administrator of the Mabary estate. The suit in equity was commenced in December, 1873, and in November, 1877, the circuit court

made a decree setting aside the deeds to McClurg, and vesting the title acquired by him in the plaintiffs in that suit, who are the plaintiffs in this suit. That decree was affirmed by this court at our October term, 1881: See 74 Mo. 575.

1. Going back, now, to the beginning of the plaintiffs' title, it is suggested that Wilson, as the administrator of the estate of John Mabary, had no power to and could not become the purchaser of real estate. To this we answer, the title passed to him as an individual, and he held it in trust for the heirs and creditors of the estate. Indeed, he inventoried the land as the land of the estate, procured an order for the sale thereof, and sold it as the property of the estate. The court below held, and correctly held, that the sheriff's deed to Wilson, as the administrator of Mabary, conveyed to Wilson all of the title of Foster, the judgment debtor. In saying this, we have no reference to subsequent statutes relating to the purchase of land by guardians, administrators, and the like. The decree against McClurg, rendered in 1877, vested the title in the plaintiffs, who have, therefore, shown a perfect and complete title; and the defendants' deeds being worthless as actual conveyances, the plaintiffs' must prevail, unless the defendants have a good defense under the statute of limitations.

2. The evidence shows, or at least tends to show, that Dollarhide took possession in 1866, and held possession until he made the title bond to Rains in 1868. Rains never paid the consideration, and hence received no deed. The relation of a vendor and a vendee, when the vendee takes possession under an executory contract, for many purposes is likened to that of landlord and tenant: *Adair v. Adair*, 78 Mo. 630; *Pershing v. Canfield*, 70 Id. 141; *Pratt v. Canfield*, 67 Id. 50. As Rains had possession from Dollarhide under an unperformed contract for the purchase of the land, his possession was, in effect, the possession of Dollarhide, and the latter may avail himself of the adverse possession of the former in making out the statutory period of limitation.

3. The court, sitting as a jury, gave, among others, this instruction: "If there was a judgment rendered in favor of Joseph McClurg and against Rains and Dollarhide for the possession of the land in question, and the appeal taken by said defendants in that case to the supreme court was voluntarily dismissed by them, then such act of dismissal by them must be taken as an abandonment by them of all claims adverse to McClurg in such case."

Every fact stated in this instruction was proved by undisputed evidence; and the instruction being given, the judgment should have been for the plaintiffs, yet we find it was for the defendants. It is to be remembered that the appeal in the ejectment suit of McClurg against Dollarhide and Rains was dismissed in this court in 1878. The suit of plaintiffs against McClurg for title was ended in this court in 1881, the decree having been entered in the circuit court in 1877. By that decree, and its affirmance here, the plaintiffs acquired all the title of McClurg. The decree vested in them all the rights which McClurg had. Any act or thing done by Dollarhide and Rains which would have been available to McClurg to defeat a defense under the statute of limitations set up by them against McClurg is available to the plaintiff for a like purpose and to the same extent. Now, if, as this instruction says, the act of dismissing the appeal amounted to an abandonment of all adverse claims against McClurg, then there was a break in the continuity of adverse possession. The possession, to be of any avail in a defense under the statute of limitations, must be not only continuous, but it must be adverse. This principle of law was well stated in the eleventh instruction given by the court. If the dismissal of the appeal operated as an abandonment of adverse claims against McClurg, that abandonment covered the whole time the ejectment suit was pending. The ten years had not elapsed at or before the commencement of that suit, nor can it be claimed that there has been ten years of adverse possession since the dismissal of that appeal. It follows that the judgment rendered by the circuit court is at war with this instruction, and the undisputed evidence upon which it is based. The judgment ought, therefore, not to stand, unless it is clearly for the right party, and that cannot be said from the present record.

4. The instruction which we have been considering, the substance of which has been stated, was given at the request of the plaintiffs, and this being their appeal, no exceptions were taken to it. Since, however, the case must be remanded for a new trial, we deem it prudent to pass upon the question whether that instruction states a correct proposition of law. This leads to the inquiry whether a judgment in ejectment, not followed up by a writ or by taking possession under it, will break the adverse possession of those against whom it is rendered. In *Brolaskey v. McClain*, 61 Pa. St. 146, one Wester, having been in possession of the land for eight years,

was then sued in an action or ejectment, and seven years thereafter a judgment was recovered against his heirs, it would seem, and they continued in possession for a period of ten or more years after the date of the judgment, and it was held that the recovery of the judgment stopped the running of the statute of limitations. And in Michigan it is held that the continuity of adverse possession is broken by a decree requiring the occupant to convey the land even if the actual possession is not disturbed: *Gower v. Quinlan*, 40 Mich. 572. On the other hand, it was said in *Smith v. Trabue*, 1 McLean, 87: "A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the statute of limitations. To do this, there must be a change of possession." The following cases are to the same effect: *Doe v. Reynolds*, 27 Ala. 364; *Jackson v. Haviland*, 13 Johns. 229. We are not aware of any decision of this court having any direct bearing upon the question. We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect, there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title. If we are correct in this conclusion, then it seems equally clear that the mere fact that the defendants in the ejectment suit dismissed their appeal after judgment against them does not amount to an abandonment of all adverse claims to the land. The dismissal of the appeal is suggestive that some terms had been agreed upon by the parties; but the mere dismissal of the appeal, nothing more appearing, cannot have the effect ascribed to it by the instruction in question, and it should not be given.

We do not say that it was necessary to sue out a writ and turn the defendants in the ejectment suit out of possession. In view of this, we venture these additional observations: The record shows that Rains and Dollarhide gave McClurg a writing, signed by both of them, stating that McClurg had recovered two judgments, one against them and the other against Dollarhide and Fisher, for the possession of the lands described in the judgments. This agreement then goes on to say: "Rains does hereby, and with the consent of Dollarhide, deliver possession of all of said lands to McClurg." If this agreement relates to the judgment in the ejectment suit of which we have been speaking, then it accounts for the fact that a writ of possession was not sued out. It settles the

question of adverse possession, and shows that Rains thereafter held under and not adverse to McClurg. The dates in the agreement do not correspond with the date of the judgment in question, but the evidence of Mr. Johnson, who represented McClurg, tends to show that the agreement had reference to the very lands in dispute, and whether it does relate to the judgment in question can be shown by the evidence hereafter offered. But even if it does not relate to that ejectment judgment, still there is much evidence, when taken in connection with the fact that Dollarhide and Rains voluntarily dismissed their appeal, tending to show that they abandoned all claims to the land, and that thereafter Rains held possession under McClurg and the Mabary heirs. If they by parol or otherwise consented to abide the judgment for possession, the resultant effect is the same as if Rains had been turned out by a writ and then became the tenant of McClurg. His possession would then no longer be that of Dollarhide, but that of McClurg and those deriving title through him.

It is unnecessary to consider the other instructions in detail. The judgment is reversed, and the cause remanded for new trial.

ADVERSE POSSESSION. — As to what is necessary to render possession adverse: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 834, and particularly note 342. A plaintiff relying solely upon adverse possession for title must show that his possession was open, notorious, continuous for the statutory period, and under claim of right: *Bishop v. Truett*, 85 Ala. 376. Consent of a person disseised is not essential to the acquisition of a title by adverse possession: *Middlesex Co. v. Lane*, 149 Mass. 101; nor will a permissive possession become adverse without an open disavowal of the title of the true owner, and the assertion of a hostile title brought to his notice: *Woodstock I. Co. v. Roberts*, 87 Ala. 436. The continued occupancy by one who has conveyed realty must be presumed to have been in subordination to his grantee's title, and such presumption can only be rebutted by clear proof of an unequivocal denial of grantee's title of which he had notice: *Schwalbach v. Chicago etc. R'y Co.*, 73 Wis. 137. The possession of one holding under a verbal purchase or gift, openly claiming the premises as his own, is adverse, and the statute runs immediately against the vendor or donor: *Commonwealth v. Gibson*, 85 Ky. 666. An annual entry for a brief period to cut grass upon part of a tract of land does not of itself constitute such a possession thereof as may be called adverse to the real owner: *Bazille v. Murray*, 40 Minn. 48. A conveyance of a part of a tract of land of which adverse possession was held before the conveyance, and not followed by immediate possession of the tract sold, breaks the continuity of adverse possession so far as the tract so conveyed is concerned: *Holstein v. Adams*, 72 Tex. 486. The continuity of adverse possession will be broken if the true owner, personally or by his agent, actually enters upon the land with intent to take possession under his lawful rights: *Johnston v. Fitzjeorge*, 50 N. J. L. 470.

AN EXECUTOR CANNOT BE A PURCHASER of any part of the assets, but must be considered as a trustee for the persons interested in the estate, and must account for any advantages made by him of the subject purchased; and any profits made by him as a purchaser at his own sale must be accounted for to the heirs: Note to *Van Dyke v. Johns*, 12 Am. Dec. 85. So a purchase by an executor at a foreclosure sale, under a mortgage, taken by him in behalf of the estate to prevent a sacrifice of the realty, inures to the benefit of the estate: *Olark v. Olark*, 8 Paige, 152; 35 Am. Dec. 676.

GRUBE v. MISSOURI PACIFIC RAILWAY COMPANY.

[98 MISSOURI, 230.]

RAILWAYS — SPEED OF TRAINS. — A STATE HAS POWER TO REGULATE THE SPEED OF TRAINS, and to make other reasonable regulations for the movement of locomotives and trains of cars in cities, towns, and other public places.

RAILWAYS — MUNICIPAL CORPORATIONS. — THE POWER TO ENACT REGULATIONS OF SPEED OF CARS AND TRAINS on railways may be delegated to cities and towns.

RAILWAYS — MUNICIPAL CORPORATIONS, POWER OF, TO REGULATE SPEED OF TRAINS WHILE RUNNING OVER PRIVATE PROPERTY. — An ordinance of a city regulating the speed at which trains may be moved in such city is applicable while such trains are being run over private lands of a railway corporation in a populous city, when such lands are not within any inclosure, and are open to the public.

RAILWAYS — MUNICIPAL CORPORATION, CONSTRUCTION OF ORDINANCE OF. — An ordinance of a municipal corporation which prohibits the movement of cars and locomotives and trains for any purpose whatever, except there be displayed on the moving front a light, controls the movements of trains on the private switch-yards and grounds of the railway company as well as on the streets and other public places.

EVIDENCE. — TO SHOW WANT OF CARE EITHER IN EMPLOYING OR RETAINING A SERVANT, it is competent to put in evidence his general reputation of unfitness for the duties assigned him, and also to prove specific acts of negligence or incompetency, knowledge of which has been brought home to his employer.

Thomas J. Portis, and Adams and Bowles, for the appellant.

Prosser Ray, for the respondent.

BLACK, J. The plaintiff is the widow of Frank T. Grube. She brought this suit to recover damages for the death of her husband, who was injured in the defendant's switch-yards at Kansas City on the 20th of November, 1883, and from which injuries he died two or three days later. There was a verdict and judgment for plaintiff, and the defendant appealed.

There are some facts set out in the petition, disclosed by the evidence on both sides, and about which there is no dispute, and they are, in substance, these. The accident occurred

between half-past six and seven o'clock in the afternoon, on side-track No. 6. It was dark at that time. The switch-tracks run in an east and west direction, and No. 6 is a short track just to the north of a main switch-track. The water-plug and coal-chutes are on the west end of No. 6. It was the duty of the switch-crews to go on this track in the evening, take on coal and water, oil and prepare their engines for the night work. At the time in question, there were three engines on the track preparing for the night work, and waiting for orders from the yard-master. These engines all fronted east, 806 stood farthest west, 804 stood six to twelve feet east, 801 stood three to six feet east of that, and a few feet farther east there were three cars standing on the same track.

Grube, the deceased, belonged to what was called the west-end crew. He was sitting on the pilot-beam of his engine, it being 804, which was the middle of the three engines as they stood on the track. At this time, O'Neal, who was the foreman of another crew, known as the east-end crew, backed a train of from eighteen to thirty-five cars in on the east end of track No. 6. He ran the train against the three cars, driving them on engine 801, which was forced against 804, and the whole in turn against 806, driving it backwards some distance. Grube was caught and injured in the collision, whilst sitting on the pilot-beam of engine 804. It may be stated here that he was at his proper place.

The petition sets out two sections of an ordinance of the city of Kansas, whereby it is enacted:—

“Sec. 5. No conductor, engineer, fireman, brakeman, or other person shall move, or cause or allow to be moved, any locomotive, tender, or car, within the city limits, at a greater rate of speed than six miles per hour, under a penalty of not less than twenty-five dollars nor more than five hundred dollars.”

“Sec. 10. No conductor, engineer, fireman, brakeman, or other person, in charge of any locomotive, tender, car, or train of cars, shall run or move, or cause or allow to be run or moved, for any purpose whatever, within this city, between sunset and sunrise, any such locomotive, tender, car, or train of cars, without having at least one lamp, headlight, or lantern conspicuously placed in front of the same, facing the direction in which the same may be moving, whether running forward or backward, under a penalty of not less than twenty-five dollars or more than five hundred dollars.”

The petition then counts upon a violation of both sections of the ordinance by O'Neal, and alleges that he was an incompetent foreman, and charges negligence on the part of the defendant in employing and retaining him in its service.

The further evidence for the plaintiff tends to show that O'Neal ran his train in on the side-track, and against the three cars and the engines, at a rate of speed from nine to eleven miles per hour; that he had no one on the west end of the train or near enough to it to receive danger signals from persons at or about the coal-chutes. The proof is clear and undisputed that there was no light on that end of the train which came in on the side-track.

For the defendant, O'Neal testified that his train was moving at the rate of about three miles per hour; that he had a man with a lantern at the west end of it, who was on the ground, and a passing train on another of the tracks obstructed his view so that he could not communicate with his engine; that this man failed to make the coupling as the cars came in contact, and hence the collision. There is evidence tending to show that O'Neal was a reckless and careless foreman, and known to be such by his superior officers; and on the other hand, there is evidence to the effect that he was a careful and prudent man, and so reputed to be.

The case was placed before the jury on the theory of the petition, namely, that a violation of the ordinance either in moving the train at a greater rate of speed than six miles per hour, or in failing to have a head-light, lamp, or lantern placed in front of the same, facing the direction in which the train was moving, was negligence on the part of O'Neal, and that his negligence in either of these respects, coupled with the facts that O'Neal was an incompetent and careless foreman, and that defendant was negligent in retaining him in its service, laid a foundation for recovery by the plaintiff. On all these points the instructions given on the one side and the other are full and fair, and need not be set out in detail.

It was, however, admitted on the trial that these switch-yards, where the accident occurred, had never been laid off into streets or alleys; that they were not used by the public, and were in the exclusive use of the defendant, but on three sides were not fenced. They are partly in Kansas. The accident happened at a point in this state. On these admissions the court refused to instruct that the ordinance had no application to the defendant in the transaction of its business in the

yards. Whilst there is abundant evidence upon which the case could go to the jury without reference to the ordinance, still the case is made to stand on the ground that a violation of the ordinance in either respect was negligence; and whether the ordinance applies to the defendant in the movement of its cars in its yards is a vital question as the case stands on this record.

1. There can be no doubt but the state has power to regulate the speed of trains, and to make other reasonable regulations for the movement of locomotives and trains of cars in cities, towns, and other crowded places. Such regulations concern domestic government, and are but the exercise of the police powers of the state: *Toledo etc. R'y Co. v. Deacon*, 63 Ill. 91; *Mobile etc. R. R. Co. v. State*, 51 Miss. 137; *Knobloch v. Railroad*, 14 Am. & Eng. R. R. Cas. 625; Tiedeman on Limitation of Police Powers, sec. 194. The power to enact such regulations may be delegated to cities and towns: *Merz v. Missouri Pac. R'y Co.*, 88 Mo. 672. In the case last cited it was insisted that, as the place where the accident occurred was on private grounds of the defendant, to make the ordinance there in question apply to it would be to deprive defendant of the use of its property. This court then said, adopting the language of the court of appeals: "When a railroad company lays down its tracks in a populous city, not within any inclosure, but on ground open to the public, the mere fact that the rails are not laid over a public street or highway, but on private property of the company, ought not to be held to relieve it of its obligation to observe all reasonable municipal regulations as to the movements of its trains within the limits of the corporation." The power to regulate the speed and movement of trains in cities and towns, both on the streets and elsewhere, is recognized and reasserted in *Rafferty v. Missouri Pac. R'y Co.*, 91 Mo. 33.

The state, and through it the city of Kansas, having the power to make reasonable regulations for the movement of trains within the corporate limits, there is no reason why a forced construction should be given to the ordinances in question, with a view of exempting the defendant's yards from its operation. The fifth section of the ordinance—the one which regulates the rate of speed—contains no qualifications whatever. The tenth section prohibits the movements of cars, locomotives, and trains between sunset and sunrise, "for any purpose whatever," except there be displayed on the moving front a light. The ordinance makes no mention of streets,

public or private grounds, but applies alike to all places in the city limits. There is nothing in the language used which will admit of the exemption of the defendant's yards. The ordinance is designed as well for the protection of those engaged in handling cars as for persons not thus engaged. In *Crowley v. Burlington etc. R'y Co.*, 65 Iowa, 658, an ordinance prohibited the running of a car or engine in the city at a greater rate of speed than six miles per hour. The plaintiff was a laborer employed in the railroad yards in cleaning snow and ice from the track, and was injured by a car which, it was claimed, was being moved at a greater rate of speed than six miles per hour. The contention made there was, that the ordinance was applicable only to that part of the city used by the public; but the court held it could not be so limited in its operations.

The defendant places much reliance upon the Rafferty case, before cited, where it was held a demurrer to the evidence should have been sustained. It is worthy of mention, though not made an element in the result there reached, that the boy who was injured in that case had no right to be in the car-yards or on the cars. His presence was unknown to the defendant's servants. Here the deceased was where his duties placed him, and the defendant owed him an active duty. Again, the ordinance in that case is essentially different from the ordinance in this case. There two empty box-cars were detached, and allowed to go down an incline, accompanied by a brakeman. He got down and coupled them to some standing cars, and they all moved on, and struck a car on which the boy was standing. We were of the opinion that the box and other cars, when thus attached for the purpose of storage on the side-track, though moving, did not constitute a backing train, propelled by steam, within the meaning of the ordinance. The accident there happened in the yards, as in the present case; but in all other essential respects the cases are wholly unlike.

Our conclusion is, that the ordinance does apply to the defendant in the movement of its trains in its car-yards. That the ordinance is reasonable as to the rate of speed is clear; and we think it is reasonable in requiring a light to be placed at the moving front of such a train as the one of which O'Neal had charge. These propositions as to the reasonableness of the ordinance do not appear to be disputed by appellant; and in this respect we express no further opinion upon the ordi-

nance than that just stated. Indeed, the case was not tried by the defendant upon the theory that the ordinance is unreasonable, but upon the theory that it did not apply to the movement of cars and trains in the switch-yards.

2. Plaintiff proved by several witnesses that at and prior to the date of the accident in question O'Neal bore the reputation among the men with whom he worked of being a careless foreman. This was followed up by evidence of various specific acts of negligence on his part in handling cars with his crew, and knowledge of them by the yard-master. To all this evidence the defendant objected. It was certainly the duty of the defendant to use reasonable care in selecting fit and competent persons to discharge the duties assigned to them. To show a want of such care, either in employing the servant or in retaining him, it is competent to put in evidence his general reputation of unfitness for the duties assigned to him: Wood on Master and Servant, sec. 420. And for a like purpose, specific acts of negligence or of incompetency, with evidence of knowledge thereof on the part of the master, may be put in evidence: *Id.*, sec. 432; *Michigan Cent. R. R. v. Gilbert*, 2 Am. & Eng. R. R. Cas. 233.

3. The further point made by appellant, and not before noticed, is, that the plaintiff's second instruction ignores the question of negligence on the part of the deceased, and ignores his knowledge of O'Neal's incompetency. This instruction directs a verdict for plaintiff, should the facts therein stated be found to be true, and, among other things, the jury were required to find that deceased was injured "without negligence on his part directly contributing thereto." The jury were told by appropriate instructions given at the request of the defendant that the plaintiff could not recover if deceased was guilty of negligence, or if he knew, or by the exercise of care might have known, that O'Neal was an incompetent and negligent foreman, and that deceased thereafter continued in defendant's employ. It is plain to be seen that these questions were not ignored, but were put forward in strong terms in a series of seven instructions given at the request of the defendant. There is little or no evidence of negligence on the part of the deceased; for it was his duty to place himself on the pilot-beam to be taken to his work. He had been in the employ of defendant but a short time, and then not with O'Neal, but worked with a different crew and in a different part of the yards. But these questions of his negligence and

knowledge of O'Neal's habits were all placed before the jury in a manner of which defendant cannot complain.

The judgment is affirmed.

RAILWAYS — SPEED OF TRAINS. — Power is given to St. Louis city under its charter to regulate the speed of railroad cars within its limits; and an ordinance of such a nature applies to the running of the cars upon the private property of the railroad company located anywhere within the city limits, as well as to other localities: *Merz v. Missouri P. R'y Co.*, 88 Mo. 672.

MUNICIPALITIES ARE MERE INSTRUMENTALITIES OF THE STATE, over which the legislature has control, having power to enlarge or modify their powers as it deems proper, within the limits of the constitution: *Wood v. Oxford*, 97 N. C. 227.

RYCHLICKI v. CITY OF ST. LOUIS.

[98 MISSOURI, 497.]

SURFACE WATER. — Owner of higher land has no right to collect surface water in drains, trenches, or otherwise, and precipitate it in a body upon lower land, to the damage of the owner thereof.

SURFACE WATER. — A MUNICIPAL CORPORATION MAY NOT, IN THE CONSTRUCTION OF ITS STREETS, collect surface water, and then, by means of drains and conduits, discharge it in volume upon the lands of an adjacent proprietor.

A. J. P. Garesché, for the appellant.

Leverett Bell, for the respondent.

BLACK, J. When this cause came on for trial in the circuit court, counsel for plaintiff made a statement of the facts which he proposed to prove. The statement was taken as proof of the matters recited, and thereupon the court directed a verdict for defendant, and plaintiff took a nonsuit, with leave, etc.

This statement, which for the purposes of this appeal must be taken as true, is not as full as might be desired, but it discloses these facts: The plaintiff owns fifteen arpents of land in the corporate limits of the city of St. Louis, bounded on the north by Page Avenue, and on the east by King's Highway. To the north thereof, and separated therefrom by Page Avenue, is a block of land, and formerly the surface water on this block, as well as from a large district of country to the north thereof, flowed eastwardly and southwardly, and on and over the plaintiff's land. In opening the streets before named, the defendant diverted the surface water at the north line of the block before mentioned, and caused it to flow east to King's Highway, thence south to Page Avenue, thence west along the

north line of that street for a short distance, and thence by drains and conduits under the road-bed of Page Avenue, discharging the same upon plaintiff's property. By reason of the water thus collected and thrown upon plaintiff, six or eight acres of his land were turned into a morass, and ruined for the purpose of cultivation, to which use the land had been before devoted; all to the damage of plaintiff in the sum of two thousand dollars. The work upon the streets was done by virtue of city ordinances duly enacted.

The only question is, whether these facts constitute a cause of action, and that they do we entertain no doubt. According to the rules of the civil law, as adopted by many, if not most, of the states of this Union, the owner of the higher adjoining land has a servitude upon the lower land for the discharge of surface water naturally flowing upon the lower land from the dominant estate. But it is well settled by the decisions of the courts which follow the civil law that this servitude extends only to surface water arising from natural causes, such as rain and snow, and that the owner of the higher land cannot collect the surface water in drains, trenches, or otherwise, and precipitate it in a body upon the lower land, to the damage of the owner thereof: *Crabtree v. Baker*, 75 Ala. 92; 51 Am. Rep. 424; *Ludelling v. Stubbs*, 34 La. Ann. 936; Washburn on Easements, 3d ed., 20, 450.

The supreme judicial court of Massachusetts is pronounced in its adherence to the common-law rule, as it is called on this side of the Atlantic. That court used this language: "But there is a well-settled distinction, that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land, to its injury": *Rathke v. Gardner*, 134 Mass. 14. Other cases in the same court, and in other courts, are to a like effect: *White v. Chapin*, 12 Allen, 516; *Martin v. Simpson*, 6 Id. 103; *Pettigrew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Templeton v. Voshloe*, 72 Ind. 134; 37 Am. Rep. 150.

The question presented by this record is, whether the defendant may, in the construction of its streets, collect surface water, and then by means of drains and conduits discharge it in volume upon the land of an adjoining proprietor. From the authorities before cited, it makes no difference whether this

particular question is tried by the rules of the civil law or by what is called the common-law rule. The result is the same, for either line of decisions rules this question against the defendant. According to our adjudications at this day, the defendant may grade and improve its streets, and is not liable for injuries arising from the incidental interruption or change in the flow of the surface water, save such injuries as may arise from the negligent doing of the work: *Jones v. St. Louis etc. R'y Co.*, 84 Mo. 153; *Foster v. City of St. Louis*, 71 Id. 157. So, too, the defendant may protect its streets from water that accumulates thereon, and to that end may construct drains, gutters, culverts, and conduits, and may discharge the water into natural drains; but it has no right to discharge the water thus accumulated upon adjacent lands in a body, as was done in this case. The true rule in cases like this was declared in *McCormick v. Kansas City etc. R. R. Co.*, 57 Id. 434, where it is said the owner of land cannot collect all the water falling upon his buildings, and by means of pipes or gutters precipitate the water upon the land of an adjoining proprietor; nor can he collect the surface water from the surrounding country into a pond, and then turn it loose in large quantities so as to injure his neighbor. The owner of higher land has no right, by means of artificial ditches, to conduct surface water to and discharge it upon the lower land of his neighbor in increased volume, thereby subjecting the lower estate to an injury it otherwise would not have suffered: *Benson v. Chicago etc. R. R. Co.*, 78 Id. 512.

We deem it unnecessary to pursue this question any further. As we understand the law, its judgment is, upon the facts before us, that defendant must respond in damages. The judgment is therefore reversed, and the cause remanded.

RAY, C. J., dissented from the foregoing opinion. He criticised the record in the case somewhat, for the purpose of showing that it did not distinctly present any question whatever, and failed to show any error upon the part of the trial court. Assuming, however, that the record was sufficient to raise the question whether the defendant was liable to respond in damages for the injuries which had resulted to the plaintiff on the throwing of surface water upon his lands, the judge was clearly of the opinion that such question must be determined against the plaintiff. He cited a number of cases determined in the state of Missouri and elsewhere upon the theory that surface water was a common enemy, against which every land proprietor had a right to fight; and that as to the surface water running down the street, or any unconfined channel, the dominant proprietor might divert it and turn it upon servient lands without liability. He claimed in particular that the case of *Foster v. City of St. Louis*, 71 Mo. 157, had established as law of that state that a city

is liable in damages for the flooding of private property caused by the construction of the streets in pursuance of the plan prescribed by ordinance only when the injury is the result of the negligent execution of the plans, not when it is the result in the defect of the plans itself.

WATERCOURSES. — A municipal corporation is liable in damages for collecting water in artificial channels, and casting it upon the property of others: *Davis v. City of Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361, and note 363; *City of Kearney v. Themanson*, 25 Neb. 147.

WATERCOURSES. — One person has no right to collect surface water in a ditch or drain and cast it upon the land of another without his consent: *F., E. & M. V. R. R. Co. v. Marley*, 25 Neb. 138. Although the owner of lower lands must receive all water naturally flowing from the higher lands, the upper proprietor cannot cast upon the lower lands by artificial means more water than otherwise would naturally flow thereon: *Anderson v. Henderson*, 124 Ill. 164. The land-owner may arrest surface water diffused over his land before it gets settled; but after it loses its vagrant character, and settles upon his land and that of another, he cannot drain it to the injury of the latter in order to recover his own land, which has become covered with water: *Alcorn v. Sadler*, 66 Miss. 221.

MUNICIPALITIES ARE NOT LIABLE when surface water collected by them percolates thence through to the cellar of adjoining premises: *Kennison v. Beverly*, 146 Mass. 467.

STATE EX REL. CHATHAM NAT. BANK v. FINN.

[98 MISSOURI, 582.]

SURETIES ON AN OFFICIAL BOND ARE NOT ANSWERABLE FOR DEFAULTS OCCURRING PRIOR TO ITS EXECUTION, unless made so by its terms.

OFFICIAL BONDS, WHEN COVER PRIOR DEFAULTS. — A bond of a sheriff, which recites that it is a new official bond given by order of court in lieu of the first bond, renders the sureties thereon responsible for their principal's conduct during his entire term of office. They are, therefore, answerable for his defaults committed prior to the execution of such bond.

STATUTE OF LIMITATIONS. — CAUSE OF ACTION AGAINST A SHERIFF FOR NOT PAYING OVER THE PROCEEDS OF ATTACHED PROPERTY DOES NOT ACCRUE until there has been a final judgment in the attachment suit establishing plaintiff's right to such proceeds. This rule is not varied nor rendered inapplicable by the fact that there was an order of court made during the pendency of the action requiring such proceeds to be paid to the clerk of the court.

STATUTE OF LIMITATIONS. — PAYMENTS MADE BY THE SURETIES OF A SHERIFF WAIVE THE BAR OF THE STATUTE OF LIMITATIONS, which might have otherwise interposed for their protection.

E. T. Farish and Valle Rayburn, for the appellants.

B. D. Lee and G. M. Stewart, for the respondent.

RAY, C. J. This is an action begun on May 9, 1884, against John Finn and sureties on his official bond as sheriff of the

city of St. Louis. The official bond was executed and approved December 27, 1879, and the condition of said obligation is, that "whereas the said John Finn was, on the fifth day of November, 1878, duly and regularly elected sheriff of the city of St. Louis, and was duly commissioned; and whereas, by order of the circuit court, made on the twenty-ninth day of November, 1879, said John Finn was ordered to give a new bond in lieu of the bond approved on November 21, 1878,—now, therefore, the condition of the above obligation is such that if the said John Finn shall well and faithfully in all things discharge the duties of the office of the sheriff of the said city of St. Louis during his continuance in the said office, then the above obligation to be void, otherwise to remain in full force and effect." The special necessity for this second bond is not disclosed by the record, but it is fair to presume that for some reason apparent to the court the original bond was deemed insufficient: See secs. 594, 3881, 3882, 3892, Revision of 1879.

The breach of the bond alleged in the petition is a failure of Finn, after his election as sheriff at the general election in 1878, to pay over the proceeds of property sold by him, under a certain attachment issued and received on the twenty-sixth day of May, 1879, in a certain cause, entitled the Chatham National Bank, plaintiff, against Meyer Goldsoll, defendant. The net balance, after deducting fees, costs, and payments made on the amounts originally collected, was \$1,985.69, for which sum plaintiffs had judgment. The sureties interpose two defenses to the action: 1. That at the time they executed said bond as sureties of the said Finn, he did not have on hand the said money or proceeds of sale received by him under the said attachment proceeding; 2. A plea of the three years' statute of limitations, in effect that in June, 1879, said Finn made his sheriff's return of the order of sale in said attachment suit, and in November, 1880, his term of office as sheriff expired, and that on December 7, 1880, by consent of said plaintiff, an order was made on said Finn to pay the proceeds of the sale, less his legal fees, etc., to the clerk of the circuit court, and that a demand was thereby made on said Finn by the said plaintiff and defendant in said attachment suit for the said proceeds, and that the present cause of action then accrued, and that the present suit was not brought in three years thereafter.

On the other hand, the claim and contention on the part of

the plaintiff is, that, under the bond sued on, defendants are liable for defaults of the sheriff during the entire term of office, and further, that the statute of limitations did not begin to run before May 16, 1881, at which date the prior order of December 7, 1880, to pay said proceeds of the said sale to the clerk was set aside, and that the further order then made by the court that the net proceeds of the sale in said attachment suit, then in the hands of said Finn as sheriff, be paid over by him to the plaintiff in said cause. And plaintiff further claims that defendants have waived the statute of limitations by part payments of the demand within the three years prior to the institution of the suit, to wit, on July 9, 1880, July 20, 1881, and September 20, 1882.

As to the first of said defenses, there is testimony in defendant's behalf, on the part of the sheriff's book-keeper and cashier, that said Finn kept his accounts and deposited all the money received by him as sheriff in the Bank of Commerce, and that between May 5, 1879, and July 9, 1879, inclusive, said Finn received and deposited the sum of \$35,142.95, and that during the same period he drew out by his checks on said bank the sum of \$38,983.67, leaving a deficit on said last-named day of \$3,840.72. Upon evidence to this effect, the defendant asked and the court refused an instruction to the jury to the effect that if they believed, from the evidence, that after the money sued for was collected by Finn as sheriff in May or June, 1879, he converted the same to his own use as early as August, 1879, and did not thereafter, in December, 1889, when the bond sued on was given, have said money on hand, then the defendant's sureties are not liable therefor.

The general rule is, that such sureties are only liable for breaches occurring after the execution of such bonds, and are not liable for prior defaults, unless made so by terms of the bond: *State v. Jones*, 89 Mo. 480, and cases cited. The bonds in question are given, it will be observed, under one and the same appointment, and the recital of the bond is, that it is a new bond, given by order of the court in lieu of the first bond approved November 21, 1878. These terms and recitals as the second bond are such as to give it a retrospective operation, as was held by the St. Louis court of appeals in the recent case of *State ex rel. v. Finn*, 23 Mo. App. 293, which was a suit on this same bond, and in which the court, speaking through Rombauer, J., use this language: "The defendant sureties contend that they became by the terms of the bond

responsible only for such defaults of their principal as occurred thereafter, and not for his defaults during his entire official term, and that the evidence tending to show that the default occurred prior to the date of the bond should have been submitted to the jury. This view is not tenable. The bond sued upon, by its terms, purports to take the place of the one originally given, which, for some reason, was deemed insufficient. Where an officer proves a defaulter, and has held the office under different appointments, with several sets of sureties, it is now settled that those sureties alone will be responsible who were on the bond at the time when the defalcation occurred: *Draffen v. Booneville*, 8 Mo. 395; *State v. Smith*, 26 Id. 226, 231; 72 Am. Dec. 204; *State v. Atherton*, 40 Mo. 209; *State v. McCormack*, 50 Id. 570. This, in the absence of a contrary intention, is the law, even where the bonds are successive bonds under the same appointment: *Smith v. Paul's Ex'r*, 21 Id. 51. But in this case the bonds were given under the same appointment, and the contrary intention is manifest by the terms of the bond. The bond was to stand in lieu or in place of the bond formerly given, and rendered the sureties responsible for the sheriff's conduct during his entire official term." This view is equally applicable to the case at bar on this branch of the case, and may be accepted as conclusive on that point.

But as the second branch presented by the special statute of limitation, the facts of this case are different from those in 23 Mo. App., and require a different ruling or statement on that point, as we shall see. In this connection we may add, that as to the second defense, interposing the special statute of limitation, the evidence shows that the property attached in the attachment suit of plaintiff against said Goldsoll was sold on June 10, 1879, upon orders of sale theretofore made, that due return was then made on said orders showing amounts realized, etc., and that on December 7, 1880, by stipulation between plaintiff's attorney and counsel for Finn, the circuit court made its order in said attachment cause, directing the money, less the fees, costs, etc., in the hands of said John Finn, late sheriff of the city of St. Louis, being the proceeds of the sale of the attached property, to be paid over to the clerk of said court.

Defendants contend in this behalf that said Finn, having disobeyed and failed to comply with said order, was then in default, and a breach of his official bond, in respect to the

faithful distribution and payment of said moneys, was then and there committed; that such order of December 7, 1880, was such a demand on the sheriff as to set the statute of limitation in motion, and that the subsequent order of the court to pay said money over to plaintiff had no effect as to the running of the statute. Defendant asked several instructions upon the said facts in evidence, presenting their views in this behalf, all of which the court refused.

Revised Statutes, 1879, section 425, provides, among other things, that the officer shall make return of the order of sale to the court at such time as shall be expressed in the order, showing how he has executed the same, and that the proceeds of such sale shall be paid into court, or otherwise disposed of as the court or judge may order. In the case now before us, there were, as thus appears, two orders of the court, the first being the said order of December 7, 1880, requiring the said proceeds to be paid to the clerk of the court, which said order was set aside, as we have seen, by a subsequent order of date May 16, 1881, directing the late sheriff to pay over the same to plaintiff. The second order was based upon an application and showing to the court that the plaintiff had, since the making of the first order, obtained judgment against the defendant in the attachment suit, and in virtue thereof was entitled to receive the said net proceeds. The judgment in the attachment suit was obtained on January 8, 1881, and the second order of May 16, 1881, above referred to, was served on said Finn on May 18, 1881. Pending the litigation in the attachment suit, and prior to the judgment therein, plaintiff could not compel the sheriff to make payment to it of proceeds of the sale of the attached property, for its right thereto was not ascertained until the controversy was determined.

The said order of December 7, 1880, which was entered upon agreement between the parties, did not give plaintiff the right to the said funds, but in terms directed the same to be paid over, not to plaintiff, but to the clerk of the court. The manifest purpose of the said order was to place the funds in the custody of the court to await the result of said litigation. Plaintiff's right to demand the same of the clerk, if said order has been obeyed, or if disobeyed, its right to demand the same of said Finn, depended, we think, on the result of said litigation. So, too, with respect to the damages which plaintiff sustained, if any. There is, we think, as pointed out by the court of appeals, a distinction between the cases of sales in execution

and in partition, cited by defendant, and proceedings under the attachment law. In *State ex rel. v. Finn, supra*, the court of appeals says: "The execution creditor or distributee in partition has a vested interest in the fund, which gives him a right in one case to demand its immediate payment to him, and in the other, to intervene at once for its protection. It is not so in attachment proceedings. The interest of parties to the attachment suit is contingent upon the termination of the controversy. Suppose the plaintiff in the present proceeding had sued the sheriff for a conversion of the fund prior to any adjudication that he was entitled to it, will it be contended that he could have recovered, if at all, substantial damages?"

In the case of *Lesem v. Neal*, 53 Mo. 419, it is held, among other things, that the cause of action against the sheriff for an unauthorized release of attached property accrues only at the date of final judgment in the attachment suit. Until plaintiff recover its judgment in the attachment suit, it was not known whether or not it had any valid demand on the said Finn in respect to this fund, or had suffered any substantial damage by his failure to pay over the same to the clerk. Notwithstanding such neglect, said officer may have been able and have stood ready to pay the same to plaintiff, on demand, after its right thereto had been adjudicated, or upon a subsequent order of the court to that effect.

As to the second defense, or the three-year statute of limitation made and relied on in this case, the facts pertinent to that issue, as shown by the record, are, as we understand, about these: This suit was commenced May 9, 1884. The final judgment in the attachment suit was rendered January 3, 1881. The application for order on sheriff to pay over to plaintiff the funds in question was made May 13, 1881. The order asked for was made May 16, 1881, and served on Finn, the defendant, May 18, 1881. It thus appears that this action was not commenced within three years after the date of said final judgment in said attachment suit. It does appear, however, that it was brought within three years after the application, making, and service of said order on Sheriff Finn, the defendant.

It, however, further appears that the defendants, to wit, the sureties on said official bond of said Sheriff Finn, through their trustee, agent, or attorney in fact, thereafter, to wit, on July 9, 1881, paid on plaintiff's said demand \$500, and on

July 20, 1881, the further sum of \$1,500, and on September 20, 1882, the further sum of \$501. If it be conceded that plaintiff's right to demand and sue for the funds in question accrued at the date of the final judgment in the attachment suit, to wit, on January 3, 1881, then the suit is barred. But if it be held that it did not accrue until the service of said order of court on the sheriff, to wit, on the 18th of May, 1881, then the suit is not barred. But, without deciding that question, and whether it be the one or the other, we are of opinion that the defendants, by their subsequent payments on plaintiff's said claim and demand, thereby waived the bar of said three-year statute of limitations so set up and relied upon in said answer: *Shannon v. Austin*, 67 Mo. 485; *Johnson v. Johnson*, 81 Id. 331; *Mastin v. Branham*, 86 Id. 644; *Chidsey v. Powell*, 91 Id. 626; 60 Am. Rep. 267, and the authorities therein cited.

This leads to an affirmance, and it is so ordered.

OFFICIAL BONDS. — Liability of sureties upon successive bonds: See *Crane v. Commonwealth*, 84 Va. 282; 10 Am. St. Rep. 839, and extended note 843-860; *County of Pine v. Willard*, 39 Minn. 125; 12 Am. St. Rep. 622.

STATUTE OF LIMITATIONS. — As to what acknowledgment of the debt will remove the bar of the statute of limitations: *Spangler v. Spangler*, 122 Pa. St. 358; 9 Am. St. Rep. 114, and note 115, 116. The indorsement, "I hereby acknowledge the indebtedness of this note," made and signed upon a promissory note by the debtor, removes the bar of the statute of limitations: *Drake v. Sigafos*, 39 Minn. 367. Where a creditor, at the request of his debtor to prolong an open account for four months, which would soon be outlawed, did extend the time of payment, and the debtor signed this statement in the creditor's book, "I extend this book-account four months from April 30, 1886," the debtor could not take advantage of the bar of the statute of limitations accruing during the four months next after such date: *Crane v. Abel*, 67 Mich. 242. An acknowledgment, to take a debt out of the statute of limitations, must be made to the creditor himself or one acting for him: *Hargis v. Sewell*, 87 Ky. 64. A new promise to pay a claim barred by the statute of limitations, whereby the promisor agrees "to pay if I owe it," does not so recognize the justness of the claim as to take it out of the operation of the statute: *Meyer v. Andrews*, 70 Tex. 327. When a debtor both acknowledges a debt barred by the statute of limitations, and makes a partial payment thereon, he cannot claim the benefit of the statute: *Pracht v. McNee*, 40 Kan. 1. A simple contract is barred by the Virginia statute in five years, and the bar of the statute cannot be removed by part payment or mere promise to pay, but only by an instrument of writing acknowledging the debt or promising to pay it: *Gover v. Chamberlain*, 83 Va. 286. Yet a contract or promise to pay a debt barred by the statute of limitations may itself be barred: *Trask v. Weeks*, 81 Me. 325.

MURRAY v. ST. LOUIS CABLE AND WESTERN RAILWAY COMPANY.

[98 MISSOURI, 572.]

FELLOW-SERVANTS, WHO ARE. — A watchman whose duty it is to guard a crossing, and to signal approaching cars to stop and start, so that they may not pass each other on a particular curve, and a gripman in charge of one of such cars, are fellow-servants, and their common employer is not answerable to either for an injury resulting from the negligence of the other.

MASTER AND SERVANT. — SERVANTS ARE IN A COMMON EMPLOYMENT when they are engaged under the same master in the same general business.

A. R. Taylor, for the appellant.

R. H. Kern, for the respondent.

BLACK, J. This is a personal damage suit, and the only question is, whether the court erred in sustaining a demurrer to the evidence at the close of the plaintiff's case.

The defendant owned and operated a cable street-railroad in the city of St. Louis, and the plaintiff's husband, James Murray, was in the defendant's employ as a watchman at the corner of Fourteenth and Wash streets. The defendant's two tracks, at that point, make a short curve. It was the duty of Murray to guard the crossing, and to prevent injuries to persons crossing the tracks, and to signal the approaching cars to stop and start, so that they would not pass each other upon the curve. Beyond this, he had nothing to do with the operation of the cars. The evidence tends to show that, in the night-time, and while Murray was in the discharge of his duties at the curve, he signaled two of defendant's approaching cars, the one to stop, and the other to move on around the curve. The car signaled to stop, through the negligence of the gripman in charge of it, failed to stop, and the gripman let it go forward until it ran over and killed Murray. Murray was exercising ordinary care.

The only question presented by this statement is, whether the negligent gripman and the deceased were fellow-servants within the rule that exempts the master from liability for injuries occasioned by one servant to a fellow-servant. The defendant cites and relies alone upon the case of *Moore v. Wabash etc. R'y Co.*, 85 Mo. 588. In that case the plaintiff was a car-repairer and was injured by the negligence of his foreman. The principle which that case turned upon was this, that where the master has intrusted to a foreman power to super-

intend, direct, and control work, the foreman in the exercise of such powers intrusted to him is a representative of the master, and for that reason not a fellow-servant. There is no evidence in this case that the gripman occupied the position of a vice-principal, and of course the plaintiff here cannot recover on any such ground.

The plaintiff cites and relies alone upon *Lewis v. St. Louis etc. R. R. Co.*, 59 Mo. 495; 21 Am. Rep. 385; *Hall v. Missouri Pac. R'y Co.*, 74 Mo. 301; and *Sullivan v. Missouri Pac. R'y Co.*, 97 Id. 114. In the Hall case, the plaintiff, who was switchman, brought his suit to recover damages for injuries received by reason of a loose iron rail left upon the track by the negligence of a section-foreman. It was there said: "The principal ground relied upon for a reversal of the judgment which the plaintiff recovered is, that a switchman and a section-foreman are fellow-servants. Adjudications of the courts of other states of the Union sustaining the appellant's position are cited by counsel, and whatever our opinion might be, if it were a question of the first impression in this court, the contrary was held in *Lewis v. Railroad*, 59 Mo. 495, and the doctrine of that case has been adhered to by this court, and we are not inclined to depart from what must, therefore, be now accepted as the rule settled on that subject in this state." The case of *Condon v. Missouri Pac. R'y Co.*, 78 Mo. 567, which is cited in the Sullivan case, was a suit by a brakeman to recover damages occasioned by reason of a defective hand-hold on the top of a box-car. The court in that case observed: "The third refused [instruction] declares that car-inspectors at the intermediate stations were fellow-servants of plaintiff, and that if the proximate cause of plaintiff's injury was attributable to any want of care or caution on their part, defendant was not liable. Car-inspectors are not co-employees with train-men: *Long v. Pacific Railroad*, 65 Mo. 225."

These observations must be considered in the light of the facts then before the court, and of the cases which are there cited. When this is done, it will be seen that the Hall and Condon cases turn upon the principle of law that it is the duty of the railroad company to furnish a safe road and cars. This duty requires the company to use due care in keeping the road and cars in repair. If this duty is devolved upon servants, their negligence in respect thereto is the negligence of the company. The doctrine sometimes asserted, that when the company employs competent inspectors and repairers, it is

not liable for injuries resulting to employees through the negligence of such inspectors and repairers, is denied in *Long v. Railroad, supra*; and the doctrine is there asserted that the carelessness of such persons in the performance of such duties is not put upon the footing of that of a fellow-servant, but such negligence is that of a representative of the company,—the negligence of the company itself. And to the same effect is *Bowen v. Chicago etc. R'y Co.*, 95 Mo. 273, and other cases.

There is in the present case no evidence of or claim that defendant failed to use proper care in respect of any of the appliances, and the cases cited by plaintiff are without application, lest it be the case of *Sullivan v. Railroad, supra*. In that case, the husband of the plaintiff was a track-walker, and was run over and killed by reason of the negligence of the engineer and fireman of a through passenger train. It was held in one branch of the case that the engineer and fireman were not fellow-servants with the track-walker, because engaged in different departments of the general business of the defendant. But it is difficult to see how that case can help the plaintiff here. It was the duty of Sullivan to walk back and forth over a section of four miles, and to see that his section of the road was in repair. He had nothing to do with the operation of the train, and he and the train-men were under different directing agents of the company. Here it was the duty of the deceased to keep watch of the cars as they approached the curve, and to give signals to the gripmen, so that only one train should pass the curve at a time. The negligent gripman and the deceased were both employed in operating the car, one from the car and the other from his station on the ground. They were engaged in the same department of work, and their common business was such that one could exercise a preventive care over the other. They were evidently servants employed in the same common employment.

The writer of this and the opinion in the Sullivan case feels in duty bound to say that the cases cited in that case, when properly considered, do not sustain the doctrine there announced, namely, that the servants are not in the same common employment when engaged in different departments of the general business of the company. The cases cited stand on the ground that it is the duty of the master to use due care in furnishing the instrumentalities with which the servant is to perform his work, and that duty is personal to the master. It does not follow, however, that the ruling in the Sullivan

case is to be disturbed. The majority of the courts, it is believed, hold that servants are in a common employment when they are engaged under the same master in the same general business.

The rule of exemption, as declared in the case of *Farwell v. Boston etc. R. R. Co.*, 4 Met. 49, 38 Am. Dec. 339, and followed in many other cases, has been much modified in this state, in so far as it relates to servants occupying different grades, so that the master is liable for the negligence of those who are clothed with power to superintend and direct subordinates: *Smith v. Wabash etc. R'y Co.*, 92 Mo. 359; 1 Am. St. Rep. 729. Many well-considered cases go still further, and restrict the exemption of the master from liability to those cases where the servants are engaged in the same department of the general business, and are in a position to have an influence over each other's conduct: *Chicago etc. R. R. Co. v. Moranda*, 93 Ill. 302; 84 Am. Rep. 168. Other cases in that court are collected in 1 Shearman and Redfield on Negligence, 4th ed., sec. 238. See also *Cooper v. Mullins*, 30 Ga. 150; 76 Am. Dec. 638; *Nashville etc. R. R. Co. v. Jones*, 9 Heisk. 27; *Northern Pacific R. R. v. O'Brien*, Wash., January, 1889. But under either line of authorities, the plaintiff in the present case cannot recover, and we say no more upon the subject at the present time.

The judgment is therefore affirmed.

FELLOW-SERVANTS, WHO ARE: *Kentucky Cent. R'y Co. v. Actley*, 87 Ky. 278; 12 Am. St. Rep. 480, and cases cited in note; *Keith v. Walker etc. Co.*, 81 Ga. 49; 12 Am. St. Rep. 296, and note; note to *Fisk v. Central Pac. R'y Co.*, 1 Am. St. Rep. 31, 33.

FELLOW-SERVANTS. — A yard-inspector and a yard-foreman, neither working under the orders of the other, but subject each to the control of the same master, the yard-master, are fellow-servants: *Railway v. Rice*, 51 Ark. 469.

ENEBERG v. CARTER.

[98 MISSOURI, 647.]

EXECUTION. — EVERY INTEREST OF A DEBTOR IN LAND, whether legal or equitable, is bound by the lien of a judgment rendered in the same county, and is consequently subject to sale under execution issued upon such judgment.

EXECUTION. — LANDS WHICH BY THE OPERATION OF A WILL ARE CONVERTED INTO PERSONALTY, without any action upon the part of the executor, are not subject to execution as real estate, and are therefore not affected by the lien of a judgment against a devisee who will become entitled to the proceeds of such lands when they shall have been sold by the executor, as directed by the will.

EXECUTION — INTEREST OF DEVISER IN LANDS, WHEN SUBJECT TO. — If a testator expresses in his will a desire to have his estate divided equally between his children, and that his executor will dispose of his real estate as soon as it can be done without loss, such real estate is not thereby converted into personalty, and the interest of one of such children therein is subject to sale under execution, and to the lien of a judgment rendered against him.

CONVERSION OF REAL PROPERTY INTO PERSONALTY BY WILL, SO AS TO CUT OFF THE TITLE OF THE HEIRS, does not take place unless the executor or other donee of the power takes the fee by necessary and inevitable implication, or such fee is in express terms conferred on him.

Charles W. Freeman, and Karnes and Kräuthoff, for the appellants.

James T. Clayton and Johnson and Lucas, for the respondent.

SHERWOOD, J. The clauses of the will which form the basis of the present contention read this way:—

“7. After all the devises and bequests above provided for have been satisfied, I desire the remainder of my estate to be equally divided between my children, Mary D. Carter, Marion Alexander, Annie R. Carter, Elizabeth C. Webb, and John L. Carter.”

“9. I hereby appoint Jesse P. Alexander, of Jackson County, executor of my estate. I desire that my executor will dispose of all of my real estate as soon as it can be done without loss to my estate.”

The testator died in 1875. On the second day of March, 1882, a judgment in favor of the Kansas City Lumber Company was rendered against John L. Carter for five hundred and odd dollars, on which judgment execution was issued to the sheriff on the twenty-seventh day of February, 1883, and his levy of the execution resulted, on the seventh day of April, 1883, in a sale of Carter's right, title, and interest in certain lots in the city of Kansas, plaintiff being the purchaser, and receiving a sheriff's deed on the date last mentioned, placed the same on record. Carter, on the fifth day of January, 1883, conveyed, or attempted to convey, his interest, being an undivided one fifth in the land in controversy, to said Alexander. The petition charges that this conveyance, as well as other mesne conveyances made and participated in by the defendants, were fraudulently made, with a view to evade the collection of the judgment aforesaid; that there was no consideration for any of said conveyances, and asks that, so far as concerns Carter's undivided one-fifth interest in the land, said conveyances be set aside and for naught held. Upon hearing the testi-

mony, the court granted the prayer of the petition and decreed accordingly; hence this appeal.

As seen from the premises, the heart of this cause is involved in the question, Had Carter, the devisee, such an interest in the land that the lien of the judgment could operate thereon? Under our statutory provisions, all interests of a debtor in land, whether legal or equitable, are bound by the lien of a judgment rendered in the same county, and consequently are subject to sale under an execution issuing upon such judgment: R. S. 1879, secs. 2730, 2731, 2767, 2354; *Slattery v. Jones*, 96 Mo. 216; 9 Am. St. Rep. 344. So that it may be safely affirmed it is a general rule, a rule almost without exception, that the interests of a defendant debtor in land are never beyond the reach of an execution.

Taking this as the predicate for investigation, the inquiry arises: Do the circumstances already detailed exempt the case of the defendant Carter from the operation of the general rule? The claim is made by counsel for the defendants that the clause of the will operated as an equitable conversion of the land covered by it, and that such conversion was of even date with that of the death of the testator.

1. If this be true, then the rendition of the judgment created no lien, and the plaintiff took nothing by the sheriff's sale and its accompanying incidents: *Freeman on Executions*, 2d ed., sec. 183, and cases cited. Taking it for granted that the words employed by the testator in the ninth clause of his will were of such a nature as to authorize the land to be converted into money, and the money thus raised to be distributed among the five residuary legatees or devisees (as to which concession, see 3 Pomeroy's Eq. Jur., secs. 1159, 1160, and cases cited); and conceding, further, that if a conversion of the land into money took place, it occurred upon the death of the testator (3 Id., sec. 1162, and cases cited; *Fletcher v. Ashburner*, 1 White and Tudor's Lead. Cas. Eq., 4th Am. ed., 1159, and cases cited); and conceding that the powers conferred by the ninth clause of the will upon Alexander was something more than a mere naked power,—was a trust of such a character that it would be recognized and enforced by a court of equity;—conceding all these things, I say, the question still recurs, Did the clause of the will in controversy operate, by its own force, and without action on the part of the executor, to convert the land into money, and thus place it beyond the lien of the judgment, and the execution issued to enforce it? I

am not of the opinion it did, and for these reasons: "It is a well-known maxim that an heir at law can only be disinherited by express devise or necessary implication, and that implication is defined to be such a strong probability that an intention to the contrary cannot be supposed": 2 Powell on Devises, 199. And his title cannot be defeated unless there was a disposition of the subject to some other person capable of taking: 1 Fonblanque's Eq. 51; *Habergham v. Vincent*, 2 Ves. 224; *Pickering v. Lord Stamford*, 3 Id. 493.

In the present case, there was certainly no express devise in fee to the executor, nor are there any such words in the will as to raise a fee in him by force of a strong implication. Therefore, the fee remained in the heirs at law, both by the devise to them, as well as by the statute of descents, until it should be divested by a sale by the executor under the terms of the will; and until such sale, no conversion could occur: *Greenough v. Welles*, 10 Cush. 571; Co. Lit. 236 a; *Warneford v. Thompson*, 3 Ves. 513; *Hilton v. Kenworthy*, 3 East, 553; *Schauber v. Jackson*, 2 Wend. 13; *Lancaster v. Thornton*, 2 Burr. 1028; *Bowman v. Matthews*, Forrest, 163; 1 Powell on Devises, 233; *Beadle v. Beadle*, 2 McCrary, 586; *Compton v. McMahan*, 19 Mo. App. 494; *Crittenden v. Fairchild*, 41 N. Y. 289; 1 Pomeroy's Eq. Jur., sec. 871.

I have been able to find no case where the doctrine of equitable conversion has been so applied as to cut out and dominate the title of the heir, except where the donee of the power took a fee by necessary and inevitable implication, or where such fee was in express terms conferred upon such donee; otherwise, the title remains vested in the heirs until the donee of the power actually exercises it.

From the foregoing, it follows that the judgment lien and execution had something upon which to operate; that plaintiff took a title; that the present proceeding was the proper one in which to assert that title, and therefore judgment affirmed.

JUDGMENT LIENS ATTACH to lands bought with the judgment debtor's money, but the title to which was taken in the name of another, in order to defraud creditors: *Slattery v. Jones*, 96 Mo. 216; 9 Am. St. Rep. 344; *Van Vleet v. Halecy*, 37 Kan. 116. Equitable interests in realty are subject to execution: *McIlwaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295, and extended note.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

CHISM v. SCHIPPER.

[51 NEW JERSEY LAW, 1.]

CONTRACT WILL NOT BE CONSTRUED LITERALLY when such construction will defeat the general intention of the parties, as evidenced by the contract itself.

ARCHITECT OR ARBITRATOR, FRAUDULENT REFUSAL OF, TO GRANT CERTIFICATE. — Though a building contract declares that the work shall be done to the satisfaction of a specified architect, to be evidenced by his certificate, that if the owner requests alterations, additions, or omissions, their reasonable value shall be added to or deducted from the contract price, and that in case a dispute arises, such architect is to decide the same, and that his decision shall be final, if certain alterations are contracted for by the owner, and made by the contractor, which the architect willfully and fraudulently decides to be within the contract and specifications, and fraudulently refuses to grant the certificate provided for by the contract, and fraudulently decides that the contractor is not entitled to payment therefor, he may maintain an action on such contract, and recover the amount to which he can show himself entitled thereunder.

ACTION by a contractor upon a building contract entered into under seal between himself and the defendant. It was alleged that the contract was to erect and finish a certain dwelling-house, "agreeable to the drawings and specifications by O. S. T., architect, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of said architect, to be testified by a writing or certificate under the hand of said architect"; that if the defendant requested alterations, additions, or omissions, which were made by the plaintiff, their value was to be deducted from or added

to the contract price, and that the defendant did request certain specified alterations, which were made, and were of the value of six hundred dollars; that the contract provided that, in the event of a dispute as to its construction, or as to the meaning of the drawings or specifications, said architect was to decide the same, and his decision should be final and conclusive. The plaintiff further alleged full performance on his part, but that the architect "willfully and fraudulently decided that the aforesaid alterations, deviations, and additions are within the true construction of said drawings and specifications referred to in such contract, and that the plaintiff is not entitled to be paid the fair and reasonable value thereof, and willfully and fraudulently withholds from the plaintiff, and refuses to sign, the certificate required by said contract for the fifth and last payment called for thereby; which fraudulent and willful decision of the architect, and fraudulent and willful withholding of the said certificate, have been brought to the knowledge of said defendant by the plaintiff, but that the defendant, though often requested, has not paid the six hundred dollars." The complaint was demurred to, and the issue raised by such demurrer was certified to the supreme court for its opinion.

Craig A. Marsh, for the demurrant.

Edward M. Colie, for the plaintiff.

BEASLEY, C. J. A comprehension of the facts stated in the summary of the declaration prefixed to this opinion will make it manifest that the question to be decided is, Can the defendant cheat the plaintiff by due course of law?

The case in brief is this: The plaintiff has done work for the defendant to the value of six hundred dollars, which work was additional to that specified in the written contract; the money was payable on the certificate of the architect, whose decision was to be final; such architect fraudulently decided that the work in question was not additional, but was embraced in the contract, and the defendant, being notified of the facts, refused to pay the demand. As the demurrer confesses the truth of this statement, it will be observed that the defendant stands now before the court saying: I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that, by a correct application of legal principles, I have the right to take advantage of this fraud, and to appropriate to myself the

moneys that are its fruits. The inquiry is, Does the law in reality justify this immoral attitude?

It should be premised to the inquiry that if this action will not lie, neither will any action lie against the defendant, founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the state, it would seem that the most cogent reasons should be forthcoming to afford a satisfactory answer to the interrogatory, Why should a man be permitted to take advantage of the fraud of another? The only known reply is, that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive.

It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man cannot contract that he himself may commit a fraud; for example, this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expurged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him? The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business; while, at the same time, its existence is palpably offensive to good morals, and consequently may well be said to be adverse to the public welfare. The consequence is, that it is, in my opinion, doubtful whether such an agreement can be legally made; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is, that the contract existing between these parties does not contain this stipulation so highly questionable.

The inquiry is, What did these parties mean? Did they intend, or by reason of the language employed must it be concluded *de jure* that they intended, to be bound by the award of the architect, even though such award was the creature of fraud?

The clause thus referred to is in the common form that has long been in frequent use; and yet it may be safely said that

it is most improbable that it would have been adopted in a single instance if it had expressed in plain terms the meaning that it is now contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor a fraudulent act. Nor does it seem probable that to the ordinary mind any suggestion of so extraordinary a purpose would be made by the generality of the expressions of this clause of the contract under criticism. And this last is an important consideration; for it is truly remarked by Chief Justice Gibson, in *Schuylkill Nav. Co. v. Moore*, 2 Whart. 477, 491, that in the interpretation of contracts, "the best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it." Tested by this standard, it would seem to be certain that the construction of this term of the contract insisted on by the defense in this case cannot prevail.

But the adverse argument is, that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been.

This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants, and not masters, of a perspicuous intent; they are to be interpreted so as to subserve, and not to subvert, such intent. As an illustration: it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for the fair and definite decision of certain matters; and it is now said that by force of the terms used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but so far as it can operate, is destructive of it. The stipulation giving the quality of finality to the action of their agent is part of a contrivance of these parties to enforce fair dealing between them in certain particulars; there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, Decide honestly between us, and your decision shall

be final; but it was utterly unreasonable for them to agree to abide by such award if it were fraudulent. For my own part, I do not believe that in the history of the human race the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraud-doer should be conclusive on the subject. And in the present instance, such a stipulation can be constructed only by an abstract interpretation of the conventional terms; for if such language be construed as a part of an integer, and in the view of purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected right of the context in which they are found. And applying this rule to the case in hand, it is not perceived how it can be reasonably said that these parties have given to the provision in question that noxious efficacy that is sought to be imparted to it.

That the clause under discussion cannot be out and out construed literally appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, *Actus Dei nemini facit injuriam*, is never applied in violation of a contract. Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions shows conclusively that they have been interpreted according to their spirit, and not in subservience to their very letter.

And indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration, in the common-law form, can be explained only on the ground

that they have been construed liberally, and not with literal narrowness. In all these submissions, the stipulation is in the most unqualified form, that the award shall be final and conclusive; but if such award be tainted with fraud, it is set aside on the application of the party. And yet it is plain that such party could not be permitted to make such application if his submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties, by the terms of their submission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case.

As another illustration of the principle that a literal interpretation is out of place when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor.

In looking to the authorities, I do not find that the point now in question has ever been put under the consideration of any of the courts of this state. The subject was not discussed or considered in any of the three cases cited in the brief of the counsel of the defendant, in the decision of which I participated.

With respect to the English law touching this topic, I am inclined to think that it is still in a fluent condition, and that the last word in reference to it has not yet been spoken. In *Clarke v. Watson*, 18 Com. B., N. S., 278, the allegation was that the arbiter had "wrongfully and improperly" neglected and refused to make his certificate,—a form of allegation that manifestly did not involve the question of fraud on his part; so that this decision has no place in the present inquiry. *Milner v. Field*, 5 Ex. 829, goes beyond the requirements of the present case, for it maintains that even the collusion of the party in the fraud of the arbiter will not dispense with the production of the latter's certificate. The decision of the court is contained in four lines, and has no reference to either legal principles or authority; and in *Clarke v. Watson*, just referred to, which was decided ten years subsequently, in the

opinions expressed, a different doctrine is stated; and in *Bat-terbury v. Vyse*, 2 Hurl. & C. 41, this latter view appears to be the one sanctioned. Even the gross misconduct of the arbiter, without the imputation of fraud, in the case of *Pawley v. Turnbull*, 7 Jur., N. S., 792, was declared by Vice-Chancellor Stuart to dispense with the production of the certificates, and the payment of the money due was decreed, notwithstanding their absence.

This attitude of the authorities it is deemed fully justifies the remark already made, that the principal question has not been definitely settled by the courts at Westminster.

The matter has been more definitely treated by the American tribunals, and the results reached seem to be very generally in accord with the views propounded in this opinion. Of this line of cases the following are leading illustrations: *Baltimore etc. R. R. Co. v. Polly, Woods, & Co.*, 14 Gratt. 447; *Lynn v. Baltimore etc. R. R. Co.*, 60 Md. 404; 45 Am. Rep. 741; *Herrick v. Belknap*, 27 Vt. 673; *Snell v. Brown*, 71 Ill. 133; *Wyckoff v. Meyers*, 44 N. Y. 143; *Thomas v. Fleury*, 26 Id. 26; *Bowery Nat. Bank v. Mayor*, 63 Id. 336; *Martin v. Leggett*, 4 E. D. Smith, 255.

In *Batchelor v. Kirkbride*, 27 Fed. Rep. 899, the question present in this case was put directly in question, and was pointedly decided; for the inquiry was, whether the plaintiff was dispensed from producing a certificate if it had been refused by the fraud of the arbiter, without collusion with the defendant. The jury was instructed at the trial, by Mr. Justice Bradley, that if such fraud was shown, the plaintiff was entitled to recover; and that ruling was upon reconsideration declared to be right, both by the distinguished judge before whom the case had been tried, and by his associate, Mr. Judge Nixon. This case in itself is of great weight, and appears to be supported by the general current of American authority.

Nor does it seem to me that by the adoption of the foregoing theory of explication these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities; they cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons; such awards can be vitiated by fraud alone, and which must be proved to the satisfaction of a jury, under a watchful, judicial supervision.

In fine, it appears to me that the foregoing construction of

the clause of the contract in question rests upon the triple ground of legal principle, authority, and public policy.

I think on this issue the plaintiff should have judgment.

MAGIE, J., dissented. His construction of the contract was, that it was not for the payment of money absolutely, but only when the owner was furnished with a certificate; that the misconduct of the person whose act was stipulated for did not furnish any excuse; that "where the parties expressly stipulate for an architect's certificate, it is obvious that they had in contemplation his conduct, including his ability to do the act, his willingness to do it, and his honesty in doing it"; that his conduct being thus expressly stipulated for, to eliminate any part of the stipulation does violence to the contract. The judge admitted that the right to recovery would have existed in favor of the plaintiff if the defendant had prevented the production of the architect's certificate.

CONSTRUCTION OF CONTRACTS. — When it is possible, every word should be given its proper force and effect: *Chrisman v. State Ins. Co.*, 16 Or. 284; but in construing contracts, the intention of the parties is of paramount importance: *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *Dunbar v. Rawls*, 28 Ind. 225; 92 Am. Dec. 311; *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107; *Coomell v. Pumphrey*, 9 Ind. 135; 68 Am. Dec. 611; *Grant v. Leach*, 20 La. Ann. 329; 96 Am. Dec. 403; *Hunter v. Anthony*, 8 Jones, 385; 80 Am. Dec. 333. The only object in construing a contract is to arrive at the intention of the parties: *Monford v. Stevens*, 68 Mich. 61.

STATE EX REL. STEELMAN v. VICKERS.

[51 NEW JERSEY LAW, 120.]

EXISTENCE OF A PUBLIC CORPORATION DE FACTO, IF NOT DE JURE, CANNOT BE CALLED IN QUESTION by an information in the nature of a *quo warranto* filed in the name of the attorney-general, at the instance of private relators.

OFFICER OF A PUBLIC CORPORATION DE FACTO CANNOT BE OUSTED from his office at the instance of a private relator, on the ground that such corporation has no legal existence.

David J. Pancoast, for the relators.

Joseph Thompson, contra.

BEASLEY, C. J. This is an information in the nature of a *quo warranto*, in the name of the attorney-general, at the instance of private relators.

The object of the procedure is to test the legal right of the defendant to the office of common councilman of the municipality called in the pleadings "the mayor and council of the borough of Somer's Point."

The information shows that this borough is a *de facto* corporation; that in the year 1886 it was organized by virtue of

the act entitled "An act for the formation of borough governments in seaside resorts," approved March 29, 1878, and its supplements, and that in the following year the defendant was elected to the office now in question. As a ground for the ouster of the defendant, the relator then avers that the methods pursued in the erection of this municipality did not conform to the statutory standard in various specified particulars, and that the act itself authorizing the creation of these local governments is unconstitutional.

Consequently, it will be perceived that the theory of the relators' case is, that inasmuch as there is no legal municipality in existence in this instance, there can be, *ex necessitate*, no such office as common councilman appurtenant to it, the inference, of course, being that the defendant is illegally arrogating such position.

It is manifest that this is an attempt to do indirectly what this court has already declared cannot be done directly, — that is, for a private relator to call in question the existence of one of these bodies that are public corporations, at least *de facto*, if not *de jure*. Such an endeavor is obviously possessed of all that impolicy that forms the basis of the prohibition alluded to; for that basis is, that it is highly inexpedient that these municipalities, being the depositaries of a part of the governmental power of the state, should have their very being put at hazard whenever any member of the community sees fit to make the assault. Being public institutions, it was determined that their existence was not to be challenged except by the state, through its attorney-general, he acting *ex officio* as the representative of the public, and that, in such a procedure, his name could not be used *pro forma* by a private relator.

This being the rule and its reason, it is manifest that it would be absolutely preposterous to permit the corporate existence to be called in question by a private person, for the purpose of dismemberment; for, in depriving the municipality of its organs, you practically dissolve it. If this defendant is to be ousted from his office of common councilman on the ground that the corporation has no life, so, for the same reason, can his associates be removed from their posts; and the same fate would await all the other functionaries of the borough, and thus this local government would, for all useful purposes, be at an end. In substance, therefore, the result of this indirect attack by a private hand would be the same as

would be the direct attack, on the same ground, upon the corporation; and the latter has already been declared by this court to be not permissible.

It is proper to further remark that this circuitous assault upon the corporate existence has an objection additional to those inherent in an immediate assault; for, in its processes, the municipality is not brought into court, and therefore has no opportunity of defending its life.

Our conclusion is, that there is no legal ground laid for ousting the defendant from the office held by him, and consequently he is entitled to judgment on this demurrer.

CORPORATIONS. — An information in the nature of a *quo warranto* lies in all cases where a charter exists, and a question arises concerning the existence of an office claimed under that charter; but the court may or may not, in its discretion, grant it: *Commonwealth v. Arrison*, 15 Serg. & R. 127; 16 Am. Dec. 531, and note.

HAWK v. LEPPLE.

[51 NEW JERSEY LAW, 203.]

REPLEVIN FOR PROPERTY TAKEN BY AN OFFICER UNDER A WRIT of attachment or execution against its owner cannot be sustained, though the property is by law exempt from seizure under such writ.

John I. B. Reiley, for the demurrants.

John F. Dumont, for the respondent.

KNAPP, J. Lepple brought replevin against Lommasson, Creveling, and Hawk for certain goods and chattels, as his property. To the declaration filed, the defendants Lommasson, as sheriff, and Creveling, as deputy, avowed the taking of the goods, and set forth in their pleading, in justification of the taking charged in the declaration, the seizure of the goods under and by virtue of a writ of foreign attachment, regularly issued out of the circuit court of the county of Warren, at the suit of said Hawk, against the said Lepple, as a non-resident debtor; that the goods were the goods of the said debtor, and that when the writ of replevin was executed, the said goods were in the custody of the said Lommasson, as sheriff, in virtue of their seizure under said writ as the goods and chattels of Lepple, the defendant in attachment. To this the plaintiff pleads in reply that both Hawk and himself, the plaintiff and defendant in the attachment, were, at the time the writ was

issued, and when the goods were seized under it, residents of the state of Pennsylvania; that, by the statutes of that state, goods of a debtor to the value of three hundred dollars were exempt from seizure for debt; that the goods attached by the sheriff under the writ were of less value than three hundred dollars; and that, as he owned no other property, they were exempt, within the meaning of the twelfth section of our attachment act, and were therefore not liable to be seized under the writ of attachment which the officer held in his hands for execution, and under which the seizure was justified. To this pleading of the plaintiff, in reply the defendants demur, and the question is, whether this is a sufficient answer to the undisputed averments pleaded by the defendants.

Whatever diversity of view has elsewhere existed regarding the right to use the writ of replevin to retake goods from the custody of an officer who holds them under seizure by legal process, it may be regarded as settled in this state that the fact that such goods are in the custody of an officer holding process of seizure will not, in law, preclude a stranger to the process from the use of the writ of replevin to assert against the officer of the law the title of such third person to the property taken; accordingly, it has been held that to an action of replevin it is not a sufficient avowry by the defendant that the goods were seized by him, as an officer, under process of execution, as the property of the plaintiff in replevin, without the further averment of title, at the time of the seizure, in the plaintiff: *Bruen v. Ogden*, 11 N. J. L. 370; 20 Am. Dec. 593; *Brown v. Bissett*, 21 N. J. L. 267.

An execution in the hands of an officer commanding a levy to be made of the goods of A in its satisfaction will not permit such officer to seize the goods of B, and against such levy B may assert his title through the action of replevin. Such goods are not taken by the command of the writ; their seizure is wholly a trespass, and it would seem like a sanction of the wrongful act to consider such goods as being in the custody of the law.

For this rule there is to be found ancient authority in England. In *Winnard v. Foster*, 2 Lutw. 1190, a third person, not the defendant in the process of seizure, was permitted to maintain replevin against the sheriff's bailiff.

A full discussion of this question will be found in *Bruen v. Ogden*, 11 N. J. L. 370; 20 Am. Dec. 593.

But the narrower question here is, whether a defendant,

whose goods are seized by an officer in obedience to the command of legal process, can, under any circumstances, maintain a replevin against such officer for the goods so taken into legal custody.

In this state, by statute, the action of replevin lies for the unlawful taking or the unlawful detention of goods, and generally, whenever the action of trespass *de bonis asportatis*, or the action of trover, may be maintained, replevin is a concurrent remedy.

But this general rule applies to the unlawful taking or detention, and not to such goods as are, through proper process, drawn into the custody of the law.

Goods taken in execution are in the custody of the law: Co. Lit. 47 a.

In 6 Comyn's Digest, title Replevin, A, it is said that replevin lies for all goods and chattels unlawfully taken. But it is also said that replevin does not lie for goods taken in execution. The principle embraced in this latter statement has been given a wider application in some of the courts in this country than has been accepted here, and the right of a third person to replevy his goods so taken unequivocally denied.

The case of *Cromwell v. Owings*, 7 Har. & J. 55, is such an instance, where it was held that replevin would not lie, even at the instance of a third person whose goods had been improperly seized in virtue of an execution against the defendant.

But in other states, as in this, authority is found only for the narrower application of the rule to defendants in the process of seizure.

At the common law it has been regarded as a contempt of the court issuing an execution to replevy the property taken under such execution: 1 Chit. 160; *Phillips v. Harriss*, 3 J. J. Marsh. 123; 19 Am. Dec. 166.

Chitty says no replevin lies for goods taken by the sheriff by virtue of the execution. If any person should pretend to take out a replevin, the court would commit him for a contempt.

In *Phillips v. Harriss*, *supra*, it is said that the defendant in the execution cannot successfully maintain an action of replevin against the officer making the levy. The institution of the action by the defendant in the execution would be a contempt of the authority of the court rendering the judgment upon which the execution issued, and ought to be punished as

such. If the defendant in the execution, after judgment had been legally entered against him, upon a full and fair trial, were tolerated in bringing his action of replevin, and by it to replevy goods taken in execution, there might be no end to the delays which a defendant might thus create. Justice and the end of the law would be effectually subdued.

In *Reynolds v. Sallee*, 2 B. Mon. 18, a case closely resembling this in hand, Reynolds sued out a writ of replevin against Sallee for a horse. The latter avowed that he was a constable, and had levied executions which were in his hands against Reynolds on the horse; the plaintiff pleaded that this horse was his only work-beast, and not subject to levy. To this the defendant demurred. The court sustained the demurrer, on the ground that a defendant in execution could not maintain replevin for the property levied on under the execution; that such a proceeding would be a contempt to the court issuing the execution.

To the same effect is the case of *Dearmon v. Blackburn*, 1 Sneed, 390; 60 Am. Dec. 160. Corn was taken by replevin as the plaintiff's share under a contract of letting. The property was taken back by replevin sued out by defendant in the first suit. The defendant officer in the second suit justified under his writ. Plaintiff replied that it was not lawful to take growing corn, and further, that replevin would not lie for "rent corn" not delivered, because until gathered and delivered the lessor had no property in it. The court, in reviewing the judgment gained by the plaintiff at the trial, reversed it, holding that the matter set up by the plaintiff was immaterial, and no answer to the justification under process; that they were matters proper to be litigated only in the first suit.

In the treatise on replevin by Chief Baron Gilbert, it is said: "If a superior court award execution, it seems that no replevin will lie for goods taken by the sheriff by virtue of the execution, and if any person shall pretend to take out replevin and execute it, a court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, and it would be troubling the execution awarded if the party of whom the money had to be levied should fetch back the goods to be replevied. And therefore they construe such endeavors to be a contempt of their jurisdiction, and upon that account commit the offender. That is, if a person attempt to

defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff."

The cases which hold, as in this state, that replevin will lie at the instance of a third person, distinguished, and quite properly, as I think, between the seizure of the goods of the defendant and of a third person, the former being regarded as done in virtue of the execution; caption of the goods of a stranger being not in virtue of the execution and a trespass.

The case of *George v. Chambers*, 11 Mees. & W. 148, presents no exception to the general rule as here applied; for while the plaintiff in that case was permitted to maintain his action of replevin for goods of his that has been seized ostensibly to pay costs imposed by a magistrate, it was held that the defendant's plea showed that the proceeding of the magistrate in imposing the fine was entirely beyond his jurisdiction, and void. In that case, the citation from Gilbert just given was accepted as a correct statement of the law.

The case of *Brown v. Bissett*, 21 N. J. L. 267, in our own state, has been cited, not as a direct decision upon the point here involved, for I think no decision is found with us upon the subject. Mr. Justice Carpenter, in that case, criticised the expression as found in the cases that "the action of replevin would not lie" at the instance of the person whose goods had been seized by an officer with suitable process; and he suggests two pleas which such a plaintiff in replevin might lawfully present in answer to the avowry of the officer of an authorized seizure of the plaintiff's goods under legal process. But these pleas are: 1. "*Nul tiel record*"; and 2. A denial of the fact of seizure. The learned judge would have been more content to say that the action may be brought, but as against such a pleading in defense, presented by the officer unchallenged by denial, the right of the plaintiff further to maintain his suit ceases. But with this or a like formulation of the rule, the right to attach for contempt in suing out replevin would seem to be inconsistent. It is certain, however, that the learned judge gave no countenance to such a plea as the plaintiff has presented in this case; for he says, in the opinion read by him, that "it has generally been held that replevin will not lie for goods taken in execution, and by a misapprehension of this rule it has been thought to extend to the case of a third person not the defendant in the process whose goods have been wrongfully seized. . . . Yet the reason of the rule applies only to replevin when brought by the defendant in

execution"; and further, in alluding to the argument of Mr. Williams, in *George v. Chambers*, *supra*, he approves the position there taken, "that replevin is said not to lie at the instance of the execution defendant, because the judgment and execution under which the defendant justifies are conclusive."

The established existence of this principle of the common law determining the rights of the defendant in the writ of seizure cannot be regarded as a subject of doubt. This the cases already referred to, and those presently cited from a large body of authorities, clearly show: *Watkins v. Page*, 2 Wis. 92; *Raiford v. Hyde*, 36 Ga. 93; *Freeman v. Howe*, 24 How. 450; *Gardner v. Campbell*, 15 Johns. 401; *Melcher v. Lamprey*, 20 N. H. 403; *Wiler v. Manley*, 51 Ind. 169.

That the rule is applicable to seizures of personalty made under every form of legal process appears to be equally clear: *Smith v. Huntington*, 3 N. H. 76; 14 Am. Dec. 331; *Freeman v. Howe*, 24 How. 450; *Wiler v. Manley*, 51 Ind. 169; *Belden v. Laing*, 8 Mich. 500.

The right to maintain the action or plead as the plaintiff in replevin in this case has pleaded, in case of seizure under attachment, would exist with equal force in favor of an execution debtor, and it is needless to point out the inconvenience, confusion, delay, and defeat of justice which would ensue were such a course of practice permissible.

Here exists a suit in attachment against the plaintiff in this cause; property of his is found in the state by the sheriff executing the process of attachment, and upon that, as an essential jurisdictional fact, that proceeding must rest as one of its bases. The proceedings of the court out of which the attachment issued are arrested; the determination of the question whether attachable property exists or not is withdrawn from that forum, and its solution is to be had only upon the final trial of the new suit instituted by the defendant in attachment, in which creditors in attachment have no standing to be heard. Such a course is unreasonable, and must be vexatious. Under our law, personal property to certain values is reserved to debtors against seizure and sale. The statutes carefully point the manner in which the reserved property shall be selected for the defendant after levy, and delivered to him. But this mode of selection is not to the exclusion of any other remedy which the common law affords the defendant, and if the pleading here contended for is the legal right of the party, no reason exists why a defendant in execution may not, upon the same

principle, sue out his replevin immediately after his goods are levied upon by execution to satisfy the debt adjudged against him, or at once sue the sheriff in trespass. That the latter is not his right was long since decided in our court of errors: *Bonnel v. Dunn*, 29 N. J. L. 435.

Nor do I think he has better legal title to the other. If the defendant in attachment considered himself aggrieved, he was not without appropriate remedy for the wrong. Without a doubt we think he had redress before the court in the attachment suit.

Proceeding by attachment in this state rests upon the existence of three jurisdictional facts: A debt due to the party purchasing the writ; the non-residence of the defendant; and attachable property of the defendant within the state, — the latter condition being equally essential with the others. Now, it was competent for the defendant in that suit to show to the court that no attachable property was within the state. The court out of which the writ issued had full power to try this question, and to quash the writ if the fact did not exist. But he was not shut up to this remedy; he had as well the right to bring his action against the wrong-doer for compensation in damages if he had suffered legal injury.

But replevin was not, as we think, his appropriate remedy, or one which, under the disclosures made by his reply to the defendants' defense, the law afforded him. He makes no denial of the existence of a record which the defendants appeal to in their justification, nor of the truth of the proceedings taken under the attachment by the sheriff; and as against the right to hold the goods thus set up, the special circumstances which the plaintiff avers afford no legal answer, nor do they lay any ground which can justify a replevy of the goods from the custody in which the sheriff held them.

The defense set up under the attachment, uncontradicted, is conclusive against the plaintiff in replevin, and judgment should be given for the demurrants.

REFLEVIN FROM OFFICER OF GOODS SEIZED UNDER PROCESS. — Replevin does not ordinarily lie for property *in custodia legis*: *Hagan v. Deuell*, 24 Ark. 216; 88 Am. Dec. 769; nor can a defendant in replevin maintain replevin against the officer who in the first action seized his property, although the property was not lawfully subject to seizure: *Dearmon v. Blackburn*, 1 Sneed, 390; 60 Am. Dec. 160, and note. As to whether replevin can be maintained against an officer who has taken property exempt from seizure into his possession under a writ, see note to *Van Dresar v. King*, 75 Am. Dec. 646.

Where cattle in the possession of a constable under an attachment were replevied by the owner, and after the constable had given a bond which entitled him to have the cattle returned to his possession, the replevin suit was dismissed, but the cattle were never actually returned to the constable, and he afterwards disclaimed possession, and refused to accept the cattle, the owner could not maintain another action of replevin against the constable: *McHugh v. Robinson*, 71 Wis. 565.

GLENN v. EDDY.

[51 NEW JERSEY LAW, 256.]

HOLIDAYS. — A SUMMONS ISSUED, TESTED, AND SERVED UPON A LEGAL HOLIDAY will not be quashed, nor will its service be vacated, when the statute creating such holiday merely declares that certain days shall be legal holidays, "and no court shall be held upon said days, except in the cases where said court would now sit upon a Sunday; and no person shall be compelled to labor upon any of said days by any person or corporation."

Alfred Mills, for the motions.

Samuel H. Grey, contra.

MAGIE, J. The summons in this case was issued, tested, and served by the sheriff on a day upon which a general election for members of assembly was held. It is now contended that the writ is a nullity, or the service thereof ineffective.

This contention is founded on the provisions of the "act establishing legal holidays, and regulating the maturity of commercial paper with respect thereto," passed June 1, 1886: Rev. Sup. 361. It is thereby enacted that certain days (among which is included the "day upon which a general election shall be held for members of assembly") shall be legal holidays, "and no court shall be held upon said days, except in the cases where said court would now sit upon a Sunday; and no person shall be compelled to labor upon any of said days by any person or corporation." The argument is, that each of the days named has thus been made *dies non juridicus*; that upon Sunday (previously the only non-juridical day) certain legal acts were invalid; and that upon these newly made non-juridical days the same acts are equally inefficacious.

The legal *status* of Sunday depends upon the provisions both of the common law and statutes. It seems that courts, in a remote antiquity, held their sessions upon Sunday, as on other days. The practice ceased, apparently, because prohibited by church canons. The prohibition became part of the common law, and courts ceased to sit on Sunday, except

constrained by necessity, as for the reception of the verdict of a jury. The maxim then used, *Dies dominicus non juridicus*, was the accepted rule. Yet the issuing and even service of writs would not seem to have been prohibited before 29 Charles II., chapter 7, which not only forbade worldly employment and business, but expressly prohibited the service of writs on Sunday. Writs always were made returnable to the regular return days, many of which fell on Sunday, and such writs and notices to appear on such days were held not objectionable, the business being transacted in fact on the following day: *Swan v. Broome*, 1 Black. 496; 1 Id. 526; 3 Burr. 1595.

In New Jersey, the common-law prohibition against the sessions of judicial tribunals (except in cases of necessity) has always been recognized. From an early period, however, writs were returnable to stated terms of the courts, which commenced on days other than Sunday. When the courts were afterward thrown open for the return of writs, Sunday was expressly excepted: Practice Act, sec. 41; Rev. 854. The vice and immorality act, moreover, also, from an early period of our history, not only prohibited worldly employment and business, but many amusements and diversions on Sunday, and coupled therewith an express prohibition of the service of writs and process on that day: Rev. 1227. Other enactments have from time to time restricted or prohibited the performance on Sunday of acts at other times lawful.

The history of the common law, and of legislation with respect to Sunday, clearly indicates that it owes its exceptional position to a general sense of its sacred character as a holy day. To no other day—although many account other days holy—has a like distinction been accorded.

When we compare the course of the common law and legislation respecting Sunday with the statute now before us, a different treatment is observable. Although some of the days named are accounted holy by many, while others are national anniversaries, or days when public duties are enjoined on citizens, yet there has been enacted no prohibition against the pursuit of any business or pleasure. There is no express prohibition against the service of the process of the courts. The direct prohibitions of the statute are aimed at only two things, viz.: 1. Compulsion to labor; and 2. The holding of courts on the days specified.

The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to

that of Sunday. "Holiday," in its present conventional meaning, is scarcely applicable to Sunday: *Phillips v. Innes*, 4 Clark & F. 234. It is applicable to all, and has long been applied to some of the days named. When the statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning. For it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done.

The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition with respect to the courts to such actual sessions thereof as would require such attendance.

This view is not out of harmony with the case of *Wilson v. Rayley*, 42 N. J. L. 132, where this court excluded affidavits taken under a rule, because taken on one of the days named in this statute. The commissioner, in taking such affidavits, was exerting a compulsory power to compel attendance of suitors and witnesses, derived from the court. His sitting was therefore that of a branch of the court, and was, in my judgment, within both the spirit and letter of the prohibition.

The view above taken of this legislation has the sanction of the court of chancery: *Kinney v. Emery*, 37 N. J. Eq. 339. See also *McEvoy v. Trustees*, 11 Id. 420.

But it is insisted that even on this construction of the statute the writ was not valid. The claim is, that the summons is a judicial writ, to support which it must be presumed that it was awarded by a court in session, and since the court could not legally have been in actual session on the day of its tests, that presumption must fail.

Upon such reasoning the supreme court of New York held that a writ issued upon Sunday could not be sustained: *Van Vechten v. Paddock*, 12 Johns. 178; 7 Am. Dec. 303. The supreme court of Massachusetts declared this to be the carrying of a presumption or fiction of law to a great length: *Johnson v. Day*, 17 Pick. 106.

To support this contention, resort must be had to the theory of an "original writ" and the distinction between it and process issued thereon, the issuing of which was deemed to be

judicial in its nature, and such process was so called a "judicial writ."

For myself, I should find it impossible to hold that judicial consideration is to be given, and solemn adjudications are to be made at this day, upon the basis of fictions so transparent and so entirely devoid of the least influence on the mode of bringing parties before a court or the merits of the controversy between them. In our practice, a summons is a first process, and so far as the record shows, the foundation of the action. To hold that the legal eye must discern an original writ underlying and supporting the suit — a writ absolutely fictitious — seems to me to border on the absurd. Nor does it seem less absurd to hold that such a summons, well known to be issued and sealed invariably by officers of the court, without the least semblance of judicial action, yet owes its validity to the fiction that such action has taken place.

But if these fictions are so interwoven with our system as not to be eradicable by the courts, I cannot attribute to them sufficient force to overthrow this writ. If viewed as a judicial writ, the issuing of this summons required no actual session of the court. The fictitious session and action of the court is sufficient. The legislation in question is aimed at such actual sessions of courts as will compel the attendance of parties, jurors, and witnesses. It may and should, therefore, be interpreted as not interfering with the fictitious sessions alone necessary to support such writs.

It is further insisted that the issue and service of the summons by the officers was prohibited. The act, however, does not prohibit labor or service, but only the compelling of labor or service. Any person may refuse, and may not be compelled, to work. Any person, officers of courts or others, may work if they choose.

It is also urged that the service of the writ did exert a compulsion on the defendant. But no act was required, and none could have been performed by him under the summons on that day. He was left free to exercise his franchise, if he was a voter. Even if the summons had been returnable on that day, under our practice, no injurious result could befall defendant. This objection cannot avail: *Kinney v. Emery, supra*.

A statute in Michigan prohibiting the holding of courts on certain days has been held not to avoid a summons issued or one of them: *Smith v. Ihling*, 47 Mich. 614. An act in Tex:

declaring certain days to be holidays was held not to prohibit courts from sitting on those days: *Dunlap v. State*, 9 Tex. App. 179; 35 Am. Rep. 736.

The motions should be denied.

HOLIDAYS. — Service of process upon a legal holiday is irregular, and may be pleaded in abatement or set aside on motion: *Whitney v. Blackburn*, 17 Or. 564; 11 Am. St. Rep. 857; compare *City of Parsons v. Lindsay*, 41 Kan. 336; 13 Am. St. Rep. 290; *Green v. Walker*, 73 Wis. 548. Where the statute designates certain days as legal holidays, and prohibits the courts from transacting business upon such days, with certain exceptions, the restriction is confined to the particular days named in the statute: *State v. King*, 23 Neb. 540.

DALE v. SEE.

[51 NEW JERSEY LAW, 272.]

UPON A BAILMENT OF GOODS FOR WORK AND LABOR TO BE DONE THEREON BY THE BAILER, THE CONTRACT BETWEEN THE PARTIES ARISES IMMEDIATELY upon the delivery of the goods to the bailee, and he cannot afterwards impose conditions, nor limit his liability resulting from such bailment.

NOTICE BY BAILER, WHEN HE RETURNS GOODS UPON WHICH HE HAS DONE WORK, THAT HE WILL NOT BE ANSWERABLE FOR ANY DAMAGES OCCASIONED BY UNSKILLFUL WORKMANSHIP, unless a claim therefor is made within a specified time, is ineffectual. The fact that the bailee accepted the goods with knowledge of the terms thus sought to be imposed by the bailee is immaterial. No contract can arise from such acceptance, because there is no consideration to support it. Though several such notices be given, each of them is a nullity, and no contract can result from them that the bailee will present his claims for damages within the time specified.

PRACTICE — AN EXCEPTION TO A DECISION OF A COURT in overruling an offer of evidence must state the grounds upon which the offer was made, and when the offer is made for a certain purpose, and the evidence is rejected, the litigant who excepts to the ruling of the trial court will not be heard in a court of review to insist that the facts offered to be proved would have been competent evidence upon an issue of fact not distinctly presented by the offer.

ACTION to recover damages for defective workmanship in dyeing silk. Plaintiff was a manufacturer of silk braids, and the defendants dyers of silk. The former delivered to the latter silk twist to be dyed. The twist after being dyed was by defendants returned to plaintiff in various parcels prior to October 1, 1881. Part of the silk thus returned was woven by plaintiff into silk braids, and in October, 1882, these braids were discovered to be of greatly inferior value, because of their

being oily, and this oily condition was due to unskillfulness in the dyeing. The defendants, as a defense to the action, offered to prove that they had frequently dyed silk for the plaintiff prior to the transaction in question, and had delivered bills for their work, and on each bill was a printed notice requiring claims to be made in three days after the delivery of dyed silk; that the plaintiff had knowledge that such notice had been uniformly printed on all bills of defendants for dyeing, to all the customers; that the oily condition of the silk might have been discovered by plaintiff at any time it was received by him, and before he had it woven into braids. Notice was not given to the defendants of any defect in work until May, 1883. No claim for damages was made except by the commencement of this action. The court held that the facts offered to be proved were not a satisfactory defense to the action; that the notices relied upon by the defendants were not parts of the contract and were inoperative. Judgment was entered in favor of plaintiff for two hundred dollars damages. The notice relied upon by the defendants, and printed on the top of their billheads, was as follows: "All claims for deficiency or damages must be made within three days from date, otherwise not allowed."

John S. Barcalow, for the plaintiff.

Eugene Stevenson, for the defendants.

DEPUE, J. The appeal given to the court of common pleas from the district court is upon matter of law, either in the judgment given by the latter court, or its ruling upon the admission or rejection of evidence. No appeal lies upon matters of fact, and the appellate court has no power to retry the case upon the merits: *Guerin v. Rodwell*, 37 N. J. L. 71, 75; *Benedict v. Howell*, 29 Id. 221; *Baldwin v. Golden Star Fraternity*, 47 Id. 111; *Haines v. Roebuck*, 47 Id. 227. If the common pleas found that the judge of the district court erred in excluding the evidence offered, there should have been simply a reversal of the judgment, remitting the record for a new trial. The final judgment given by the pleas in favor of the defendants was erroneous. Whether this court, in reversing the judgment of the pleas, shall remit the record to that court, to the end that the proper judgment may be entered there, or shall reverse the judgment of the pleas and affirm the judgment of the district court, depends upon whether the ruling

of the judge of the district court, in excluding the evidence offered by the defendants, was or was not erroneous.

The defendants received the plaintiff's goods upon a bailment *locatio operis faciendi*, to do work upon them for a reward. Incident to such a bailment, and from the act of employment, the law implies an undertaking that the work shall be done with due care and competent skill. The duty of the bailee in the premises is a non-contract obligation imposed by law, and the parties may, by express contract, enlarge, abridge, qualify, or supersede the obligations which otherwise would arise from the bailment by implication of law.

The defendants claim that they were not liable for the damages occasioned by unskillful workmanship, unless a claim for such damages was made within three days after the redelivery of the goods to the plaintiff, or rather within three days after the delivery of the bill for the work done.

Stipulations or conditions that a carrier or telegraph company shall not be liable for damages, unless claim be made within a limited time after the goods or message were delivered for transmission, have been held to be valid when reasonable, and binding when brought home to the shipper of the goods or the sender of the message: *Lewis v. Great Western R. R. Co.*, 5 Hurl. & N. 867; *Southern Express Co. v. Caldwell*, 21 Wall. 264; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Ellis v. American Tel. Co.*, 13 Allen, 226. But in all the cases in which stipulations or conditions of this character have been held to be contracts, they were contained in or made part of the original contract of bailment. Notices of such conditions, printed at the head of shipping receipts or in the headings of the paper on which the telegram is written, have been held to amount to contracts. But a notice given after the goods or message are delivered and received cannot have any such effect. The contract implied by law arises immediately when the bailment is accepted, and notice subsequently given would be inefficacious to establish a contract for the want of mutual assent and sufficient consideration. Thus if goods be delivered to and accepted by a carrier without an express contract, he cannot discharge himself from the liability implied by law by subsequently transmitting to the shipper a contract of affreightment qualifying his liability: *Gott v. Dinmore*, 111 Mass. 45; *Bostwick v. Baltimore etc. R. R. Co.*, 45 N. Y. 712; *Guillaume v. General Transportation Co.*, 100 Id.

491. Upon a bailment of goods for work and labor upon them, the contract between the parties arises immediately upon the delivery of the goods to the bailee, and upon the completion of the work for which the bailment was made, it is the duty of the bailee to return the goods to the owner. He cannot prescribe the conditions under which he will perform that duty. Notice by the bailee, with the return of the goods, or with his bill for the work done, qualifying his liability for defective workmanship, are terms of his own dictation. His refusal to restore the goods to the owner, except upon those terms, would be wrongful. And although the owner should accept his goods with knowledge of the terms proposed, no contract would arise therefrom. The transaction would lack the consideration necessary to support a contract.

The ruling of the judge of the district court excepted to was not in excluding evidence which might be competent, as tending to show that in fact the silk in question was delivered to them under a special contract. The facts set out in the defendants' offer were submitted to the court as in themselves a defense to the action; and the ruling excepted to was the disallowance of the defendants' claim that these facts made out a complete defense. Those facts, so far as they are pertinent to this inquiry, are as follows: That the defendants had frequently dyed silk for the plaintiff prior to this transaction; that they had always delivered bills for their work in such cases, with the notice printed thereon, of which notice the plaintiff had knowledge before the silk in question was delivered; that for some of the work in question such bills had been delivered, and that no claim for damages had been made within the time designated in the notice. There was no offer to show that the plaintiff had ever yielded to, complied with, adopted, assented to, or in any wise recognized the terms contained in the notice as the arrangement between him and the defendants for the transaction of business between them.

The defendants' contention was, that the facts mentioned in the offer of themselves constituted a defense, as *ipso facto* establishing a special contract. This contention it was that the judge overruled.

The evidence offered was insufficient to establish a general usage of the trade. All that was proposed on that subject was to show that such notices have been uniformly printed on all the bills rendered by the defendants to their customers, from prior to this transaction to the present time. Nor was

it proposed to be shown that the plaintiff had knowledge of the defendants' course of business in that respect. Whatever foundation the defense could derive from the evidence excluded rested on the isolated transactions between these parties,—the notices on the bills delivered to the plaintiff, and his knowledge that they appeared on those bills.

From what has already been said, it is apparent that no one of these notices, of itself, constituted a contract with respect to the work to which the bill on which it was printed was applicable. When the first bill was sent to the plaintiff, the notice on it was a nullity. So with the second, and so with each of the bills in the series. As these bills came in from time to time, while the plaintiff knew the notice was upon them, it must be assumed that he also knew that the notice was, in law, a nullity, and, in legal effect, only an announcement by the defendants *in terrorem* of their intention to resist claims for damages not made within three days, and the plaintiff was justified in so regarding it. Each of these notices being in itself a nullity, it is inconceivable how, upon any legal principle, the frequency with which they were repeated could create out of them a contract on the part of the plaintiff, without a *scintilla* of evidence of assent to the terms expressed in them. Notices of similar import, such as all claims for shortage or breakage must be made in so many days, are not uncommon in invoices of goods sold and in bills given by carriers on the delivery of goods to the consignee, and I am not aware that such notices have, by any judicial decision, been recognized as having any validity whatever, unless supplemented by some evidence that the original purchase or shipment was made upon such terms.

The facts embraced in the defendants' offer, standing alone, would be wholly insufficient to establish a special contract between the parties. The district-court act allows exception to be taken to the ruling of the judge in excluding evidence or in overruling a defense. No rule of practice and procedure is better settled than that, in taking exception to the decision of the court in overruling the offer of evidence or excluding a defense, the exception must state the grounds upon which the offer was made. Litigants who have excepted to the court's refusal to rule that a certain state of facts, if proved, would amount to a complete defense in law, cannot insist, in a court of review, that the facts offered to be proved would have been competent evidence upon an issue of fact not distinctly pre-

sented. *Grand Trunk R'y Co. v. Jennings*, L. R. 8 App. C. 800, is a precedent quite apposite, and the remarks of Lord Watson, on page 803, have direct application. The principle is supported by numerous decisions in this state. The facts excluded having been offered as in themselves a defense, the ruling of the judge of the district court that they were insufficient for that purpose was correct.

The defendant's counsel, in his brief, called in question the measure of damages adopted by the judge of the district court. The rule adopted appears to have been the difference between the market value of the braids in the oily condition of the silk and the market value they would otherwise have had. Consequential damages of this kind may be recovered for breaches of contract of this character, and there is nothing in the case certified to show that, as applied to this case, the measure of damages was improper. The evidence offered and excluded, with respect to the plaintiff's ability to discover the oily condition of the silk before it was made into braids, was not offered for any bearing it might have on the damages recoverable. It was part of the case offered as a complete defense. If that circumstance could have any effect in controlling the measure of damages, the attention of the judge was not called to it, and there was no exception on that point.

The judgment of the common pleas should be reversed, and the judgment of the district court be affirmed.

BAILMENTS. — A bailee is presumed to have been negligent, and he must rebut the presumption, where the bailor shows that he delivered the property over to the bailee in a good condition, but it was returned to him in a damaged state: Note to *Malaney v. Taft*, 6 Am. St. Rep. 133.

PERCEY v. POWERS.

[61 NEW JERSEY LAW, 432.]

BY CIVIL RIGHTS IS MEANT these rights which the municipal law enforces at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. Among these rights is the right to prosecute and defend actions in the courts of the state according to the established rules of practice.

THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF is a civil right. **RELIGIOUS PRINCIPLES ARE THOSE SENTIMENTS** concerning the relations between God and man which may influence human conduct.

THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF CANNOT BE DENIED on the ground that he does not believe that God will punish per-

jury, if the constitution of the state declares that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles."

Joseph A. Beecher, for the plaintiff.

Ludlow McCarter, for the defendant.

DIXON, J. Assuming the common-law rule to be that no person can be a witness in a judicial proceeding unless he believes that God will punish perjury, it becomes necessary to consider the effect of that clause in the first article of our state constitution, which declares that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles."

By statute in this state, parties in suits are generally competent witnesses in their own behalf, and when the prosecutor tendered himself as a witness in his own behalf before the common pleas, his right to testify would have been conceded had he believed that God would punish perjury. His right was denied merely because he did not so believe. It was not that he did not think himself bound to tell the truth according to his oath, but only that he had not an affirmative faith that the Divine Being would inflict some penalty upon him if he violated his obligation.

Two questions, therefore, arise: 1. Is the right of a party to testify in his own behalf a civil right? 2. Is the belief of a person as to whether God will punish perjury to be ranked among his religious principles?

By civil rights, I understand those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguishable from natural rights, which would exist if there were no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope, and still others are enforceable under it as civil rights. They are also distinguishable from political rights, which are directly concerned with the institution and administration of government.

Among civil rights is the right to prosecute and defend actions in the courts of the commonwealth according to the established rules of practice. This proposition is sufficiently vindicated by a reference to the civil rights cases in the supreme court of the United States (100 U. S.), where it is assumed as true by all the justices of that tribunal. Thus in

Strauder v. West Virginia, 100 U. S. 303, Mr. Justice Strong, expressing the opinions of himself and all his associates, except justices Clifford and Field, says that the fourteenth amendment of the federal constitution was intended to secure to the colored race all the civil rights which the white race enjoy, and speaks of section 1917 of the revised statutes of Congress (which enacts that all persons within the jurisdiction of the United States shall have the same right to sue, be parties, and give evidence) as putting in the form of a statute what had been substantially ordained by the constitutional amendment; and in *Ex parte Virginia*, 100 Id. 339, 367, Mr. Justice Field, speaking for himself and Mr. Justice Clifford, says: "The equality of the protection secured [by the Fourteenth Amendment] extends only to civil rights, as distinguished from those which are political, or arise from the form of the government and the mode of its administration. And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure," etc.

In the light of these statements, it seems clear that the statutory right of a party to testify in his own behalf is a civil right.

The next question is, whether a person's belief as to the punishment of perjury by the Deity is to be classed among his religious principles. This is, I think, equally clear.

Religious principles are those sentiments, concerning the relations between God and man, which may influence human conduct. Of these, perhaps the most influential hitherto has been the view entertained as to the probability that God would punish vice. A person's sentiments on that subject must be deemed part of his religious principles.

It is urged that disbelief cannot be called a religious principle. Perhaps, if one denied the existence of a Supreme Being, it might in a proper sense be said that he had no religious principles, because he could not entertain any opinion touching the relations between God and man, unless a denial of any such relations might be so denominated. But to a person who believes in the existence of a Supreme Being, there pertain necessarily, or at least probably, some views with regard to the relations between Him and us which modify the

life of the individual. The mere fact that in those relations he has discovered no divine purpose of punishment for specific acts does not militate against his possession of religious principles, and among them are his belief, his disbelief, and his doubt concerning those relations.

From these premises it seems to follow that when a party claims the statutory right to testify in his own behalf, he cannot be denied on the ground that he does not believe God will punish perjury.

It may be suggested that the civil rights protected by this clause of the constitution are only those which were recognized when the constitution was framed, and that, therefore, the right of a litigant to be a witness for himself having been created since that time, it is not among those thus secured. But it would, I think, be unreasonably cramping this provision thus to confine it.

One of the great causes which led to the settlement of the American colonies was the desire of the immigrants that their government should not make discriminations against them because of their religious tenets. It was not so much that they esteemed any particular privilege denied to them as of value sufficient to warrant their expatriation, but they insisted upon the more general doctrine that their belief or disbelief on religious topics should not debar them from rights which the laws afforded to other subjects.

Even up to the time of the Revolution this doctrine had not broadened out into the principle which we now consider just; for in the colonial constitution of July 2, 1776, equality of rights was claimed for only those of Protestant faith, the language being, "that no Protestant inhabitant of this colony shall be denied the enjoyment of any civil right merely on account of his religious principles." But evidently the framers of that instrument were aiming to establish a rule of action which should control the operations of all departments of the government they were forming, and not merely to guard the rights they had previously possessed. It was because those rights had been inadequate that they had repudiated the government which refused to enlarge them, and to secure such extension the new government was organized. In this government, so important was to be the doctrine of impartiality towards the religious views of Protestants, at least, that every person entering upon the exercise of legislative functions was required to bind himself by an oath not to assent to any law,

vote, or proceeding which should annul, repeal, or alter it. The idea that in enacting laws to confer upon the people civil rights not before enjoyed, or, in their interpretation, this fundamental doctrine could be disregarded, appears wholly inadmissible. When, in 1844, a more enlightened spirit stripped the doctrine of its sectarian bonds and developed it into a principle of liberty, assuring to all persons the enjoyment of civil rights irrespective of their religious principles, there was certainly no purpose to lessen the scope or vigor of its operation. It was still designed to permeate every department of the government. The object in view was to guarantee to every one that his religious principles should never, under any circumstances, be made the ground of denying to him any civil right, which, with different religious principles, he might lawfully claim. I can perceive no reason for insisting upon the enforcement of this constitutional provision, with regard to rights existing at the time of its adoption, which does not with equal strength support its application to those subsequently created.

My conclusion is, that the defendant below should have been admitted as a witness, and that, consequently, the judgment of the common pleas must be reversed. The record should be sent back to the common pleas for a new trial.

It is, of course, not intended to imply, by the foregoing opinion, that the competency of witnesses generally will not be affected by their religious principles. It is only when the civil rights of the proffered witness himself are involved that the constitutional prohibition can be interposed.

WITNESSES. — As to the incompetency of a witness on account of religious belief: *Note to Bowlin v. Commonwealth*, 92 Am. Dec. 473, 474. As to whether a witness may be questioned concerning his religious belief: *Carter v. State*, 63 Ala. 52; 35 Am. Rep. 4, and note 7; compare *Commonwealth v. Smith*, 2 Gray, 516; 61 Am. Dec. 478, and note.

WITNESSES — PARTIES TO THE SUIT. — A witness who is a party to a suit may be asked, in a general way, touching the issues of fact involved: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299. Parties to actions may be witnesses in their own behalf: *Wilkins v. Stidger*, 22 Cal. 231; 83 Am. Dec. 64; but a party to a suit cannot be sworn as a witness in his own behalf and examined without notice of his intended examination having been given: *Milwaukee etc. Co. v. Gamecock*, 23 Wis. 144; 99 Am. Dec. 138. A party to a suit, who is grantee in a deed which he offers in evidence, may testify to the handwriting of the subscribing witness, on making satisfactory excuse for not producing the witness himself: *Calera Land Co. v. Brinkerhoff*, 87 Ala. 422. So one who is not a party to a bond, but who has agreed with the obligor to pay it, is competent as a witness to prove payment, even

though the obligee is dead: *Wager v. Barbour*, 84 Va. 419. At common law a party to a suit could not be a witness, with some exceptions; but under the Alabama code he can be a witness in all cases, except in respect to certain transactions with deceased persons: *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736. In an action upon the case against a corporation, by the assignee of shares of stock for its refusal to transfer to him such stock upon its books, the plaintiff may testify as a witness in his own behalf: *Firemen's Ins. Co. v. Peck*, 126 Ill. 493. The heirs of a deceased, when contesting their ancestor's will, are incompetent to show the insanity of the testator at and prior to the time of his making the will: *Brace v. Black*, 125 Id. 33; *Way v. Harriman*, 126 Id. 132; but a person interested though not a party to the suit against an administrator is a competent witness for either party: *McBrien v. Martin*, 87 Tenn. 12.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

SMITH v. IRWIN.

[51 NEW JERSEY LAW, 507.]

MINOR SERVANTS ASSUME THOSE ORDINARY RISKS OF THEIR SERVICE which are obvious to them, or which have been pointed out in a manner suited to their youth and inexperience. They cannot ignore the duties of common prudence or the instruction of their superiors to guard themselves from apparent danger consequent upon their employment.

EMPLOYER OF A MINOR, WHEN THE EMPLOYMENT IS HAZARDOUS in its nature, is under the duty to give him notice of the danger, and such instruction as will enable him to comprehend and avoid it. These instructions and precautions must be so graduated to the youth's ignorance and inexperience as to make him fully aware of the danger to him, and to place him substantially in the same position as if he were an adult.

JURY TRIAL. — REQUEST FOR INSTRUCTION MAY BE REFUSED WHEN the legal principles contained therein have been fully and clearly presented to the jury in their instructions.

NEGLIGENCE ON THE PART OF THE PLAINTIFF WILL NOT PRECLUDE HIM FROM DAMAGES SUFFERED FROM THE NEGLIGENCE OF THE DEFENDANT, UNLESS plaintiff's negligence contributed to the injury which he suffered.

J. Frank Fort, for the plaintiff in error.

Ludlow McCarter, for the defendant in error.

VAN SYCKEL, J. There are two suits involving the same questions of law, one brought by the father to recover damages for injury to his son, and the other brought by the son, in the name of the father, to recover compensation for injury to himself. Smith, the defendant below, was a manufacturer in the city of Newark. Robert J. Irwin, the son, then seventeen years old, was injured August 4, 1886, while working a circular saw on the said defendant's premises.

The question for consideration on the trial of the cause was, whether, under the evidence, the defendant below was liable in law to respond in damages for the injury which is the subject-matter of this suit.

The only question to be determined in this court is, whether the trial judge correctly stated to the jury the law pertaining to the case.

In the first part of the charge he stated the law as follows: "An employee takes upon himself the risks that are fairly and reasonably incident to the employment in which he engages. That, gentlemen, is the general rule of law. It applies in all cases where the employee is an adult. But the doctrine I have stated is modified where the employment is of an infant, — a minor, — and is one that in its nature is hazardous. Then the rule is, that the employer is under a duty to give the employee such notice of the danger, and such instruction, as would enable him to comprehend the dangers that are incident to his employment; and before I leave the case in the hands of the jury, I think in your minds it will resolve itself into the inquiry, whether that duty has been performed. In order to express the proposition of law I have mentioned with more clearness, I will read it from a book of acknowledged authority. The author, speaking of the general rule I have mentioned, that is, that the employee takes upon himself all the risks that are naturally and fairly incident to the employment in which he engages, uses this language: 'This rule is modified so far as to put upon himself, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him in substantially the same position as if he were an adult.' That law has been recognized and been made the basis of decision in our own supreme court: *Beckham v. Hillier*, 47 N. J. L. 14. I will read an extract from that opinion: 'Minor servants are also held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to the comprehension of their youth and experience.' They take upon themselves the 'ordinary risks of the service which are obvious to them, or which

have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the duties of common prudence or the instructions of their superiors to guard themselves from those apparent dangers, and charge the consequences upon their employers.' That, gentlemen, is the law as established, not only elsewhere, but it is the law as established in this state, and the rule of law that is to be applied in this case."

The evidence was uncontradicted that the boy was totally unacquainted with machinery, and had no previous experience in the running of a circular saw.

The trial judge, in commenting on the evidence, therefore, committed no error in law in saying to the jury: "That a machine of this character is a dangerous machine is obvious to the senses of every one, and I think that you will have no difficulty in reaching the conclusion that the employment of an inexperienced boy less than seventeen years old in the management of a machine like this, without such instructions as would enable him to avoid injury from the machine, would be a violation of the duty of the master."

After further commenting on the evidence, the judge then said to the jury: "If, after considering the evidence, you come to the conclusion that the defendant did not perform his duty, —in other words, that the boy was set to work at a hazardous duty, in the course of which he received this injury, without such warning and such instructions as the law requires the master to give, —and find a verdict against the defendant, the next question will be the assessment of damages."

That the law of the case was correctly expounded in the charge as above quoted, is too well settled to be controverted. It must have been obvious to the jury that the trial judge, in speaking of the boy as "an inexperienced boy," meant that he was inexperienced in the use of a buzz-saw. Under the evidence, there was no dispute whatever about that fact. The court did not withdraw from the jury the right to determine whether it was necessary that any instruction should have been given by the employer to the boy; it was expressly charged "that minor servants are held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them; that they cannot ignore the duties of common prudence, or the instructions of their superiors, to guard themselves from those apparent dangers, and charge the consequences upon their employers."

The defendant's counsel requested the court to charge the jury as follows:—

1. If the plaintiff had such instructions, caution, information, or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant is not liable, and it makes no difference whether he derived it from the defendant or Reilly, or from his own perceptions and intelligence.

2. The plaintiff cannot recover in this case, unless the jury are satisfied that he is manifestly so incapable of understanding the nature and extent of the danger as to be unable to perform his work with safety, without such instructions or caution that were not given him.

3. If the plaintiff was negligent to any extent, however little, he cannot recover, even though the defendant was negligent.

4. If the jury believe the plaintiff had reached the age of discretion, he is chargeable with the exercise of due—that is, ordinary—care, and the defendant is not liable for any injury that arises from any obvious risks.

The case shows that the court declined to charge as requested, or otherwise than as already charged.

Whether these requests to charge were handed to the court before or after the charge had been delivered to the jury does not appear affirmatively. In the ordinary practice, the requests to charge are presented to the trial judge before he commences to instruct the jury.

After he has delivered his charge, if he finds anything in the requests which is proper to be charged, and which has not been covered by his previous instructions to the jury, he proceeds to instruct the jury accordingly. If the legal propositions contained in the requests have, in the opinion of the trial judge, been sufficiently presented, he states to counsel that he refuses to charge otherwise than has been charged.

As to the matters contained in the first, second, and fourth requests, the law had been fully, clearly, and accurately given to the jury, and it was not error in the court to refuse to repeat the legal propositions which had been so well presented. In fact, the jury might have been embarrassed, if not misled, by the mere statement of general rules of law, without a reference to the facts and a repetition of portions of the charge, to show how the legal doctrines should be applied. The rules of law which govern the case were so clearly enunciated in the

first part of the charge that it cannot be presumed that an intelligent jury could have misapprehended the views of the court, whether the requests to charge were presented before or after the charge was delivered. The statement that the court refused to charge upon these subjects otherwise than had been charged could not have led the jury to suppose that the court intended to change or modify in any respect the instructions previously given.

On the contrary, it was, in effect, a declaration that the court adhered to its charge as previously submitted to the jury. The law upon the subjects embraced in the requests to charge having been correctly declared by the trial judge, his refusal thereafter to charge otherwise than had been charged was correct.

As to the third request to charge, it would have been error in the trial court to accede to that request. It is an inaccurate statement of the law. To conclude the plaintiff from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that, if he had not been negligent, he would have received no injury from the negligence of the defendant: *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434.

We find error in the proceedings below, and the judgment should therefore be affirmed.

INFANT EMPLOYEES. — Risks assumed by infant employees, and the employer's duty with respect to them: Note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 28-31; compare *Brasil Block Coal Co. v. Gafney*, 119 Ind. 455; 12 Am. St. Rep. 422.

CONTRIBUTORY NEGLIGENCE does not necessarily prevent plaintiff's recovery: *Virginia etc. R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note.

INSTRUCTIONS MAY ALWAYS BE REFUSED by the trial court when their substance has already been given to the jury in other instructions: *Potts v. Parker*, 126 Ill. 201; 9 Am. St. Rep. 571; *McGrath v. Village of Bloomer*, 73 Wis. 29; *Smith v. State*, 26 Tex. App. 50; *Sharp v. Blankenship*, 79 Cal. 411; *People v. Lennon*, 79 Id. 625.

EDMUNDS v. ROSE.

[51 NEW JERSEY LAW, 547.]

NEGOTIABLE INSTRUMENT. — ACCOMMODATION INDORSER OF THE NOTE OF A MARRIED WOMAN cannot escape liability on the ground of her coverture. His indorsement is an implied guaranty that the maker was competent to contract in the manner in which, by the terms of the paper, she purported to contract.

H. W. Edmunds, for the plaintiff in error.

J. M. E. Hildreth, for the defendant in error.

GARRISON, J. This was an action brought in the circuit court by John H. Rose against J. Henry Edmunds, upon a promissory note, of which the following is a copy:—

“\$100.

CAPE MAY CITY, Sept. 6, 1886.

“Three months after date I promise to pay to the order of J. Henry Edmunds one hundred dollars, at Third National Bank, Philadelphia, without defalcation. Value received.

(Signed)

“ALLIE G. BENNETT.”

Indorsed: “J. HENRY EDMUNDS, JOHN H. ROSE, Commercial Ice Company, GEORGE A. SCHARP, Treasurer.”

At the time of the making of this note, Allie G. Bennett was a married woman. The defense was, that her signature imported no contract, and that the defendant incurred by his secondary obligation no greater liability than his principal.

This defense is predicated upon the assumption that the note was signed in Pennsylvania, where, in absence of proof to the contrary, the common-law disability of married women will be presumed to exist. Such an assumption of fact is, however, without warrant. The testimony discloses nothing to show that the note was not signed and delivered at the place where it is dated, to wit, Cape May City.

The court before whom the case was tried (a jury having been waived) does not find as a fact that the note was signed in Pennsylvania. In his opinion, which deals correctly with all parts of the case, that circumstance is assumed for the purpose of disposing of the legal question which such a state of affairs would present.

The note, if made in New Jersey, will be governed by our statute, under which the maker and indorser are severally liable.

If, however, we regard the case as one in which the contract of the principal is open to the defense of coverture, that cir-

cumstance will not inure to the benefit of the indorser. Such a defense is not open to him. The defendant, by his indorsement of the note, impliedly guaranteed that the maker was competent to contract in the manner in which, by the terms of the paper, she purported to contract: *Wagoner v. Watts*, 44 N. J. L. 126; *Kimball v. Newell*, 7 Hill, 116; *Putnam v. Schuyler*, 4 Hun, 166; *Penfield v. Goodrich*, 10 Id. 43; *Erwin v. Downs*, 15 N. Y. 575; *Remsen v. Graves*, 41 Id. 471; *Davis v. Statts*, 43 Ind. 103; 18 Am. Rep. 382.

The judgment of the circuit court is affirmed.

SURETIES UPON A MARRIED WOMAN'S NOTE are liable, even though she herself may not be liable on account of her coverture: *Davis v. Statts*, 43 Ind. 103; 18 Am. Rep. 382; *Winn v. Sanford*, 145 Mass. 302; 1 Am. St. Rep. 461, and cases cited in note.

AM. ST. REP., VOL. XIV. — 45

CASES IN CHANCERY
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

WADDINGTON v. BUZBY.

[45 NEW JERSEY EQUITY, 172.]

TESTAMENTARY CAPACITY. — One who at the time of executing his will was capable of recollecting the property he was to dispose of, understanding the manner of disposition therein set forth, the objects of his bounty, and the nature of the business in which he was engaged, is possessed of requisite testamentary capacity.

WILL. — EXECUTION OF A WILL IS SUFFICIENTLY PROVED when it appears that it was executed in the presence of two witnesses, though the clause of attestation does not say that they signed in the presence of the testator, if it is shown that the testator and the witnesses were all together when he signed, and that he requested them to sign as witnesses of such will.

WILL — UNDUE INFLUENCE. — THE INFLUENCE WHICH WILL VITIATE A WILL must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, and which he is unable to refuse or too weak to resist.

WILL DRAUGHTED BY INTERESTED PARTY. — The fact that a will was drawn by one who was made executor, and whose children were the favored legatees, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will. Whether a will so drawn shall be permitted to stand or not must depend on the circumstances of each particular case; no general rule must be made applicable to all cases.

W. T. Hilliard and W. E. Potter, for the appellant.

C. H. Sinnickson, for the respondent.

SCUDDER, J. A careful consideration of the facts in this case has changed my first impression, and led me to a different result from that reached in the courts which have made the prior examinations of the questions presented. It appears,

in my judgment, that sufficient weight has not been given to the extent of the right which the law gives to the owners of property to dispose of it by will; the moderate capacity required for the exercise of this right, and the aid they may invoke from others in giving order and legal form to their wishes, without subjecting them to the charge of fraud and undue influence.

At the date of this writing, and its execution, April 20, 1882, Ruth W. Buzby was about eighty-three years old, and she died in 1886. She was feeble and forgetful to the extent that persons ordinarily are at such an advanced age, and she was nearly blind, so that she could not read, or did so with difficulty. But she could at that time go about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property, and where it was invested, objected to the reduction of the percentage of interest, took a part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. She had been an intelligent woman, but not of very strong will, rather reticent than talkative, and became more silent and absent-minded as she grew old. She was injured by a fall, and failed in physical and mental strength from that time gradually until her death. The opinions of witnesses as to her mental capacity are of no weight, unless sustained by facts on which such opinions are founded; and those who saw her seldom, or but once, and say she was silent and appeared absent-minded, gave little aid in determining this question. *Lowe v. Williamson*, 2 N. J. Eq. 82, *Sloan v. Maxwell*, 3 Id. 563, *Whitenack v. Stryker*, 2 Id. 8, *Andress v. Weller*, 3 Id. 604, *Stackhouse v. Horton*, 15 Id. 202, *Pancoast v. Graham*, 15 Id. 294, *Stevens v. Van Cleve*, 4 Wash. C. C. 262, *Den v. Vancleve*, 5 N. J. L. 589, *Harrison v. Rowan*, 3 Wash. C. C. 580, *Turner v. Cheesman*, 15 N. J. Eq. 243, *Eddy's Case*, 32 Id. 701, 33 Id. 574, *Collins v. Osborn*, 34 Id. 511, and others that might be cited, are cases in our state where persons who were aged, diseased, blind, and infirm have executed wills, and the rule of capacity by which they may be sustained has been enunciated. It is shown, to my satisfaction, that the testatrix, at the time she executed this writing, was capable of recollecting the property she was about to dispose of, understanding the manner of distributing it therein set forth, the objects of her bounty, and the nature of the business in which she was engaged. If so, she had the requisite testamentary capacity. The paper

was in fact executed by her as her last will and testament, in the presence of two witnesses, present at her house at the same time. The attesting clause does not say that they signed in the presence of the testatrix. One of these subscribing witnesses is dead; the other is living, but does not remember the circumstances; he is certain as to his signature, and that of the other witness is proved by his son. It is shown by the testimony of the other two persons who were present at the signing of the paper, that they were all together in the dining-room when she signed, and requested them to sign as witnesses to her will. This completes the attestation. It also appears that the will was read to her before signing. She took the will, after execution, herself, upstairs, put it in a box with her other papers, in a drawer of her room where she slept, and it remained in her possession until her death, about five years after its date. Of the fact of its due execution, and her capacity to make it, there seems to me to be satisfactory proof offered.

The more serious question in the case is, whether Ruth W. Buzby executed this writing, purporting to be her last will and testament, through the undue influence of George G. Waddington, the proponent. The influence that will vitiate a will must be such as, in some degree, destroys the free agency of the testator, and constrains him to do what is against his will, but what he is unable to refuse or too weak to resist: 1 Jarman on Wills, sec. 87; *Lynch v. Clements*, 24 N. J. Eq. 431; *Moore v. Blauvelt*, 15 Id. 367.

It is claimed that this appears in several particulars. The proponent wrote the will, in which he was made sole executor, and his son and wife were favored legatees. In *Rusling v. Rusling*, 35 N. J. Eq. 120, 36 Id. 603, it was said that the fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will. The same rule would apply where the legacies were given, not to himself, but to those who stand in such near relationship to him as a son and wife. We must, therefore, look for other circumstances. Each case must be judged by its own circumstances, and no general rule can be made applicable to all cases.

The testatrix had three children—Mary Buzby, Beulah Gaskill and Nathan Buzby. The son had died some years before her death, leaving a son of the same name, who is the caveator against the probate of this will. Mary Buzby lived with her mother until she died, on March 29, 1882. She cared for her

in their home, aided her in the management of her property, but there is no evidence that she exercised undue influence over her. Her entire property was the sum of five thousand two hundred dollars, invested in bonds and mortgages, and some household furniture of no great value. Some years before her death she made a will, by which she bequeathed twelve hundred dollars to Beulah Gaskill, and the residue to Mary Buzby. That will was drawn by Aaron Fogg, a neighbor. On the evening before Mary died, a codicil was written by Aaron Fogg to this will. He went to the testatrix's house, at the request of the proponent, and it was there executed by Ruth W. Buzby, and witnessed by him and his daughter, who went with him for that purpose. The exact form of the codicil is not given, but it was for the benefit of Mary B. Waddington, the proponent's wife, who is the daughter of Beulah Gaskill, and granddaughter of Ruth W. Buzby. She was taken by the testatrix when an infant, named after her daughter Mary, brought up by them with care and affection, and remained with them until her marriage. By the will in controversy, fifteen hundred dollars is given to Beulah Gaskill, and some furniture; one hundred dollars to Ann B. Gaskill, and some silverware; one hundred dollars to Isabella P. Gaskill, and some silverware; six hundred dollars to Asher B. Waddington, her great-grandson; six hundred dollars to Martha Hancock, in lieu of any charge for services, or otherwise, she might make against her estate; and the residue to Mary B. Waddington, her granddaughter.

Her reason for giving no legacy to her grandson, Nathan W. Buzby, the caveator, is stated in her will in these words:—

“My grandson, Nathan W. Buzby, heired a legacy for one thousand dollars by the will of his grandfather, Asher Buzby. By the failure of my co-executor, George W. Ward, I have been compelled to pay the greater part of said legacy out of my own resources, and this is the reason my said grandson, Nathan W. Buzby, is not mentioned as a legatee in this instrument.”

This payment was demanded of her by her grandson when it was said that she had but ten dollars left in the house for their present support; and there is evidence that, although she was patient at the time, and afterwards treated him with kindness and affection, she was displeased with his demand for the money, and his extravagance in spending it after he had received it.

Beulah Gaskill went to live with her mother after Mary's death, and remained with her until her death, with the promise that she would be provided for. She also received fifteen hundred dollars by the will of her sister Mary. From this disposition of the property, it will appear that all, excepting six hundred dollars given to Martha Hancock for services in the family from the time she was a child, was bequeathed to Beulah Gaskill and her children; Mary B. Waddington and her son Asher, namesake of his grandfather, receiving the greater portion of the estate. The exclusion of Nathan W. Buzby was in the former will, drawn by Aaron Fogg, with which Waddington had no connection; and Beulah Gaskill's individual portion was largely increased after the death of her sister Mary by her will and by the terms of this will, though in these proceedings she is hostile to the proponent.

These dispositions appear more like the natural operation of the mind and affection of the testatrix than results of the fraudulent contrivance or undue influence of Waddington, who wrote this will. His conduct, his character, and relationship to her do not warrant such charges against him without more direct and certain evidence. Until about the time of Mary's death, it does not appear that he took any interest in her business. He lived at Elsinboro, two and a half miles from the testatrix's home in Salem. After Mary's death, he attended to her money matters, collected her interest and deposited it for her, advised the investment of her money, when the security was changed, and, with her consent, reinvested it for the best rate of interest she could obtain. He was the husband of her granddaughter, and apparently the nearest connection with whom she could advise, and on whose judgment she could rely as the infirmities of age increased. While it would have been more delicate and prudent for him, under the circumstances, to secure the services of a stranger to prepare a will for the testatrix, yet, if she had sufficient capacity to make it, and this is the voluntary expression of her wishes in disposing of her property, his mistake, or even officiousness, in tendering his services, should not be allowed to defeat her purpose, long entertained, and expressed in a former will, to exclude the caveator from any portion in her property. The decree should be reversed, and the will admitted to probate.

Under the peculiar circumstances of this case, the caveator will be allowed \$250, in lieu of costs, expenses, and allowances

in all courts, and the executor will be given his costs and expenses out of the estate.

Decree reversed.

TESTAMENTARY CAPACITY. — As to testamentary capacity generally: *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220, and particularly note 240, 241; *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489, and cases in note; *Herster v. Herster*, 122 Pa. St. 239; 9 Am. St. Rep. 95, and note. The presumption of the law is in favor of testamentary capacity: *Elkinton v. Brick*, 44 N. J. Eq. 154; *Chrisman v. Chrisman*, 16 Or. 127. Extreme physical debility is not of itself sufficient to establish incapacity to make a will: *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577; yet the habitual use of morphine may be of such a character as to constitute a ground for questioning a testator's capacity for making a valid will: *Frost v. Wheeler*, 43 Id. 573. If a testator is not laboring under some delusion with respect to his property, the mere fact that he is willfully or ignorantly mistaken with reference thereto does not incapacitate him to make a valid disposition of it by will: *Brace v. Black*, 125 Ill. 33. Being under guardianship does not incapacitate one to make a will: *Will of Slinger*, 72 Wis. 22.

WILLS — UNDUE INFLUENCE. — As to what is undue influence which will avoid a will: *Herster v. Herster*, 122 Pa. St. 239; 9 Am. St. Rep. 95, and particularly note 110, 111. Influence, to be undue, must take away the testator's free agency, and amount to moral or physical coercion: *Trost v. Dingler*, 118 Pa. St. 259; 4 Am. St. Rep. 593, and note; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Latham v. Schaal*, 25 Neb. 535; *Herster v. Herster*, 116 Pa. St. 612. The fact that a will is natural, prudent, and logical in its provisions, and the testator was in full vigor of mind and body and of fair business capacity at the time of executing the will, is sufficient to overcome any ordinary presumption of the exertion of undue influence upon the testator: *Brick v. Brick*, 43 N. J. Eq. 167. The fact that a testator made two wills, and within a few days after making the second, and after several days of severe illness, of which he died, made a third will, revoking those previously made, is not alone sufficient to establish undue influence upon the part of his wife, to whom he left all his property by his last will: *In re Nelson*, 39 Minn. 204. Circumstances upon which undue influence is sought to be established must show that the testator was induced to act under some coercion, as he would not otherwise have acted in the disposition of his property by will: *Will of Slinger*, 72 Wis. 22; *Malcomsen v. Graham*, 75 Iowa, 54; *Primmer v. Primmer*, 75 Id. 415; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577. Section 1575 of the Civil Code of California, with reference to undue influence, applies to wills as well as to contracts: *In re Kohler*, 79 Cal. 313.

WILLS, PUBLICATION, ATTESTATION, AND PROOF OF: See note to *Peck v. Cary*, 84 Am. Dec. 241, 242; *Will of O'Hagan*, 73 Wis. 78; 9 Am. St. Rep. 763, and note.

ARNOLD v. HAGERMAN.

[45 NEW JERSEY EQUITY, 122.]

RESCISSION OF CONTRACT. — A REPRESENTATION MADE IN A CASUAL CONVERSATION by one partner to another, to the effect that he was worth thirty thousand dollars above his debts, is no ground for the rescission of a contract made by him some time afterwards, and not in contemplation when the conversation took place, with his partner, for a transfer to him of the partnership assets, in consideration that he would assume the partnership indebtedness, though subsequent developments showed that he was not in fact worth anything in excess of his obligations.

RESCISSION OF CONTRACT. — PROMISES HONESTLY MADE, which the promisor is unable to fulfill, do not furnish sufficient grounds for vacating a contract based thereon.

RESCISSION. — GRANTORS CANNOT AVOID A TRANSFER on account of a fraudulent purpose on the part of the grantee, if they had notice of the facts and circumstances from which such purpose is inferred.

RESCISSION. — ELECTION TO RESCIND A CONTRACT ON THE GROUND OF FRAUD must be made promptly upon discovering the fraud. If any act is done by the complaining party after discovering the alleged fraud towards perfecting or carrying out the contract, it is an irrevocable election to abide by the contract.

RIGHT TO HAVE PARTNERSHIP PROPERTY APPLIED TO THE SATISFACTION OF PARTNERSHIP DEBTS is a right which each partner has as against the other; and they can by their agreement put an end to this right, as where they dissolve the partnership, and assign its property to one of their number, or to a stranger, without the reservation of the right.

EQUITY OF CREDITORS OF PARTNERSHIP TO HAVE ITS ASSETS APPLIED TO THE EXTINCTION OF ITS LIABILITIES continues only so long as the right of partners against each other exists, and perishes when that terminates, except that the right cannot be defeated by alienations made with intent to hinder, delay, or defraud the firm creditors by defeating their equity.

FRAUDULENT TRANSFER OF PARTNERSHIP ASSETS. — TRANSFER OF PARTNERSHIP PROPERTY by the copartners, or by one partner with the consent of the other partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts.

TRANSFER BY ONE PARTNER TO THE OTHERS OF ALL THE PARTNERSHIP PROPERTY in consideration of his assumption of the partnership liabilities, when all knew that the firm and each of its members were insolvent, and could not meet his or their mutual obligations, cannot defeat the right of the firm creditors to have their demands satisfied out of such property before any of it shall be applied to the payment of the debts of the partner to whom the transfer was so made, because from such transfer a common intent to hinder, delay, and defraud the partnership creditors must be inferred, and furthermore, the transfer must be regarded as voluntary.

BONA FIDE PURCHASER, WHO IS NOT. — If a purchaser in any manner receives notice of prior adverse rights in and to the subject-matter before he has fully acquired or perfected his own interest under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration.

EQUITY OF PARTNERSHIP CREDITORS UNDER ASSIGNMENT FOR BENEFIT OF CREDITORS. — If a partner who holds the assets of a dissolved partnership subject to the equities of its creditors makes an assignment for the benefit of creditors, such property will be held by his assignee subject to the same equities as against all the personal creditors of the assignor who, when they proved their claims, had notice of such equities.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS NOT VOID BECAUSE IT HINDERS or delays creditors, if such delay is no longer than is necessary for the execution of the trust, which it properly declares.

PRACTICE — RELIEF. — Where a bill in equity was filed on behalf of complainant alone to have partnership assets applied to the lien of his judgment, and the facts pleaded and established did not show him to have any special or peculiar lien, but only a right in common with all other partnership creditors to have the partnership assets marshaled for their benefit, a decree may, nevertheless, be entered marshaling such assets for his and their benefit in the same form as if the bill had been exhibited on the behalf of the complainant, and all other creditors of the same class who might come in under it, if the prayer of the bill was for an appointment of the receiver to control and dispose of such assets under the direction of the court.

ACTION by Hagerman and Fielder against Farr, Arnold, and the Second National Bank of Red Bank, to set aside an assignment by Hagerman and Fielder to Farr, and also action by such Second National Bank against Farr, Hagerman, and Arnold, and others, to have such assignment set aside, and the firm property applied to the payment of the bank's execution. The court of chancery, in its decree, declared the assignment made by Fielder and Hagerman to Farr void. From such decree an appeal was taken.

Gilbert Collins, for the appellant.

A. C. Hartshorne, for Hagerman and Fielder.

John C. Applegate and Mr. Fred. W. Hope, for the Second National Bank.

DIXON, J. On July 17, 1883, John C. Farr, having a lumber business in Hoboken, and a wood manufacturing business in Asbury Park, formed a copartnership in the latter business with John H. Hagerman and John S. Fielder, under the name of J. C. Farr & Co., to continue for four years. Under their agreement Hagerman and Fielder each gave to Farr his note for seven thousand five hundred dollars, and thereupon property already in the business at Asbury Park became the capital of the new firm, owned one half by Farr and one quarter by each of the others. Each partner was to draw out a stated sum annually, and the profits and losses were to be divided in pro-

portion to their respective interests, but the profits accruing to Hagerman and Fielder were to be applied toward the payment of the notes aforesaid. The firm also assumed the debts of Sullivan & Co., a concern of which the new partnership was said to be a continuation.

On October 29, 1883, the new firm, being embarrassed, dissolved, and Hagerman and Fielder assigned all their interest in the business and property of the partnership to Farr, Farr surrendering to them the notes aforesaid, and agreeing to pay the debts owing by the firm, and which were assumed by the firm from the firm of Sullivan & Co., and to save Hagerman and Fielder harmless therefrom.

On November 30, 1883, Farr assigned all his property to Benjamin W. Arnold for the purpose of securing to his creditors an equal distribution of his property and effects, pursuant to the directions of the statute of this state, entitled "An act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors," and the supplements thereto.

In January, February, and March, 1884, the Second National Bank of Red Bank recovered several judgments in the supreme court against the members of the firm of J. C. Farr & Co. for partnership debts, and caused executions thereon to be levied upon what had been the property of said firm.

On March 3, 1884, Hagerman and Fielder filed their bill in the court of chancery against Farr, Arnold, the bank, and others, to set aside their assignment of October 29th to Farr, alleging that they had induced them to make the same by fraudulent representations and for a fraudulent purpose; and on March 10, 1884, the bank filed its bill in said court against Farr, Hagerman, Fielder, Arnold, and others, to have said assignments by Hagerman and Fielder to Farr, and by Farr to Arnold, set aside as fraudulent against the creditors of J. C. Farr & Co., so that the property of said firm might be applied to payment of the bank's executions, and also praying that, if necessary, a receiver might be appointed to take charge of the business, assets, and effects of John C. Farr, and also those which were of J. C. Farr & Co., to manage, control, and dispose of the same under the direction of the court.

These bills and the answers thereto of the defendants above named present the issues now to be decided. The causes have throughout been tried and argued together, since they aim at similar results; nevertheless, their proper decision can be

reached only under the guidance of principles which are quite dissimilar.

The complaint of Hagerman and Fielder will be first considered.

The statements relied upon by them as the ground for setting aside their transfer to Farr are substantially these, as gathered from the testimony of Hagerman, to whom alone any statements were made by Farr: In a casual conversation about business, held in the streets of New York at an indefinite time, before any discussion was had about Farr's buying out the partnership property, Farr said to Hagerman that his Hoboken business had made ten thousand dollars a year, and that he could pay his debts and have thirty thousand dollars left. About the 1st of October, 1883, the creditors of Sullivan & Co. were pressing J. C. Farr & Co. for payment, and Hagerman went to see Farr about it, and told him that unless they got funds to meet the debts their notes would be protested, and they would get on bad credit with the bank. Farr promised that he would borrow ten thousand dollars from Mr. Arnold. Subsequently, Farr sent Hagerman word that Arnold would not let him have the money, because he was not satisfied with the Asbury Park business, and wanted a settlement of his accounts (Arnold being a large creditor, mainly of the Hoboken business). Hagerman again called on Farr, who said that his Albany creditors (Arnold being one) were urging him, and that he could get along a great deal better with them if he had the Asbury Park business in his own name; Hagerman replied that he would be perfectly willing to assign his interest over to him, if it would be of any benefit in getting him out of his trouble, and thought Mr. Fielder would be willing to do as he did; Farr thereupon promised that he would then go ahead and straighten out his affairs, and there would be no more trouble about it; afterwards, a committee of the Albany creditors having come down to Hoboken, the assignment was prepared and executed, with their concurrence.

In these statements there is nothing to warrant the rescission of the assignment.. So far as they purported to represent existing facts, the evidence shows that they were all true, except the allegation that Farr was worth thirty thousand dollars above his debts. That allegation was made in a casual conversation in the streets of New York before the assignment in question was thought of. It was uttered, we think, *bona fide*, and in view of circumstances quite different from those

which presented themselves when the negotiations for this transfer were in progress, and therefore Hagerman and Fielder had no right to regard it as entering into those negotiations. Indeed, it is plain that those negotiations proceeded, not upon the idea that this statement was accurate or reliable, but upon the fear that Farr's assets were unequal to his debts, and his financial difficulties were almost, if not quite, insurmountable. Whatever of these so-called misrepresentations related to the future were but promises honestly made, and Farr's inability to fulfill them does not at all invalidate the assignment.

The fraudulent purpose which the complainants, by their bill, impute to Farr, as prompting him to obtain this transfer, was a design to secure the property of J. C. Farr & Co. for the payment of his personal creditors, and so to leave the complainants without the means of discharging their obligations as members of the firm. But we have failed to discover any grounds for saying that this was Farr's motive, except such as were substantially known to the complainants when they conveyed to him their interest in the firm property. They may not, indeed, have been apprised of the precise proportion which Farr's assets bore to his liabilities, but they knew that he was insolvent,—that his notes were under protest; and if the court, from the circumstances now disclosed, should infer that Farr's purpose was as charged, the complainants, from the facts then patent to them, ought to have drawn the same inference. Consequently, if we are satisfied of the existence of this imputed design, we must also be satisfied that the complainants were cognizant of and acquiesced in the scheme. In that case, the transaction did them no wrong, and they have no standing to complain of its effect upon others: *Schenck v. Hart*, 32 N. J. Eq. 774.

But even if Hagerman and Fielder were, at the time, deceived as to Farr's responsibility and purpose, their subsequent conduct was such as to deprive them of the right to rescind their transfer on that account. Upon discovery of fraud which has induced a contract, the party defrauded must promptly elect whether he will rescind or not; and if he then evinces an intention not to rescind, the contract becomes as to him irrevocably established. In the present case, when Farr made his assignment to Arnold for the benefit of his creditors, his inability to extricate himself and his plan for disposing of his affairs were plainly revealed to Hagerman

and Fielder; yet, so far from repudiating their conveyance, upon the ground that this assignment was a fraudulent perversion of it, they actually took part in perfecting and carrying out this assignment, Hagerman acting as appraiser in making Arnold's official inventory and valuation, and both Hagerman and Fielder being employed by Arnold for some weeks afterwards to manage the Asbury Park business in his behalf. This conduct shows an election to stand by their transfer, after they were fully apprised of all the circumstances, because of which they now seek to avoid it.

Their bill should be dismissed, with costs.

The bill of the Second National Bank raises questions requiring the application of different principles. It insists that the transfer from Hagerman and Fielder to Farr, as also that from Farr to Arnold, were void with respect to the creditors of J. C. Farr & Co., because they were contrived of fraud, covin, or collusion, with intent to hinder, delay, or defraud those creditors.

The earlier assignment will be first dealt with.

In equity, a partnership is for some purposes deemed a single entity. Thus when the property involved in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and is used, first, to liquidate the debts contracted in the business of that debtor, and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intention of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in *Ex parte Ruffin*, 6 Ves. 119, it has been generally held that the partners could put an end to this right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their number, or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct.

Growing out of this right of partners has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally, it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this

equity may survive the right to which ordinarily it is attached. In this respect it resembles the claim which the general creditors of an individual have upon his property; it is neither an estate nor a lien; it is ordinarily but a right, by lawful procedure, to acquire a lien during the ownership of the debtor; yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of *bona fide* purchasers, for good consideration, without notice.

Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual; and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent extinguishment of the right of its partners *inter sese*, yet if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects. This doctrine has repeatedly been recognized in the courts of New Jersey. Thus in *Matlack v. James*, 13 N. J. Eq. 126, two members of a firm consisting of four persons conveyed their undivided half of land, held for partnership purposes, to an outsider, in payment of their individual debt to him. Chancellor Green, finding that the conveyance was designed to defeat the equitable claim of partnership creditors, adjudged it void, and applied the whole proceeds of the land to paying those creditors. In *National Bank of the Metropolis v. Sprague*, 21 Id. 530, 544, Mr. Justice Van Syckel, speaking for this court, plainly intimated an opinion (the case not calling for a decision on the point) that an insolvent firm could not defeat this equity of partnership creditors by giving to creditors of the individual members a prior lien on partnership property; and referred to Chancellor Walworth's opinion in *King v. Schoonmaker*, 3 Barb. Ch. 46, 50, as supporting that doctrine by sound reasoning. The language of the chancellor thus approved was: "The copartners certainly have the right to dissolve the partnership, and divide the property of the firm between them, provided there is no intention of delaying or

hindering their creditors in the collection of debts. . . . The case would have been entirely different if copartners, who were insolvent, and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, had made an assignment of the property of both to pay the individual debt of one of the copartners only. For an insolvent copartner, who was unable to pay the debts which the firm owed, would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable, at law or in equity." So in *Vandoren v. Stickle*, 24 N. J. Eq. 331, affirmed by this court, 27 Id. 498, it was declared that a voluntary transfer by a firm of notes owned by the partnership to the wife of one of the partners was fraudulent as to partnership creditors, and the notes in the hands of the wife were decreed to be partnership assets. To the like effect is the language of Mr. Justice Depue, delivering the opinion of this court in *Clements v. Jessup*, 36 Id. 569, 572: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts."

The case before us comes clearly within the reach of this principle. At the time of the transfer by Hagerman and Fielder to Farr, the insolvency of each of these persons and of the firm of J. C. Farr & Co. was patent to them all, and, indeed, was the moving cause of the transfer. They all knew that, in the condition of affairs then existing, none of them could meet maturing obligations, and it was in the hope of facilitating an extension or compromise with creditors that the transfer was made. The transfer embraced all the partnership property. If valid in all respects, it appropriated the shares of Hagerman and Fielder to the payment of the debts of Farr, for which those shares were previously not liable, and left Hagerman and Fielder without any property whatever, as we gather from the testimony, to pay their debts. Inevitably, therefore, by defeating the equity of the partnership creditors, it would hinder them in the collection of their just claims. It is a reasonable inference that these partners intended this manifest effect of their act, and, consequently, the assignment

by Hagerman and Fielder to Farr must, according to the terms of the statute, be deemed void as against the partnership creditors.

Not only upon the ground of a common intent to hinder partnership creditors, thus inferred from the knowledge which all parties must have had of the necessary consequences of the transfer itself, but also upon the ground that the transfer was made without valuable consideration, was voluntary in the legal sense, it should be decreed invalid against the partnership creditors, all of whose debts were then in existence: *Haston v. Castner*, 31 N. J. Eq. 697. The consideration nominally given by Farr to Hagerman and Fielder was the surrender of their notes, and his covenant to indemnify them against firm creditors. But, according to the testimony, those notes were payable only out of the profits accruing to Hagerman and Fielder from the firm of J. C. Farr & Co., and as that firm had failed, and was dissolved without realizing any profits, the notes had become absolutely valueless. Farr's covenant to indemnify does not constitute a valuable consideration, since he may be relieved therefrom on the total failure of the transfer for which it was made: 2 Pomeroy's Eq. Jur., secs. 751, 969; notes to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 82; *Haughwout v. Murphy*, 22 N. J. Eq. 531.

It thus appearing that, notwithstanding this transfer, all the rights and remedies of the creditors of J. C. Farr & Co. remained against the firm property in the hands of Farr, we are brought to consider the assignment to Arnold for the benefit of Farr's creditors.

With respect to this assignment, the following propositions may, I think, be maintained: 1. That the creditors of J. C. Farr & Co. are included among its beneficiaries; 2. That it conveyed not only the property of Farr as an individual, but also that which had been the property of J. C. Farr & Co.; 3. That it conveyed this latter property subject to the equity of the creditors of that firm; and 4. That, so construed, the assignment cannot be successfully impeached by the complainant.

The first proposition is unquestionable. The creditors of J. C. Farr & Co. were all creditors of Farr, for whose benefit the assignment was expressly made.

In considering the second proposition, it must be remembered that at the time of this transfer Farr was in reality the owner of the property previously belonging to J. C. Farr & Co.;

he had become so by the conveyance from his partners, which then nobody had disputed; so that the assignment to Arnold of all the property owned by Farr included in its terms the firm property. This was made still clearer by the inventory annexed, which specified in detail the property at Asbury Park. Even if the transfer from Hagerman and Fielder to Farr be disregarded, still it will appear that the assignment to Arnold included the property of J. C. Farr & Co.; for, in view of the fact that it purported to convey such property, the conduct of Hagerman and Fielder precludes their denial of its efficiency. They both knew that Farr was about to assign the firm property to Arnold; they both, without objection, delivered over that property to Arnold, in pursuance of Farr's assignment; they both took part in the management of that property under Arnold as assignee, and neither of them raised any question as to Arnold's title, until after creditors of J. C. Farr & Co. had proved their debts under the assignment. Whether in these circumstances we look for a ratification by Hagerman and Fielder of the transfer of firm property by Farr as their partner and agent, or for a transfer directly by the joint act of all the partners, or for an estoppel preventing Hagerman and Fielder from denying that the assignment conveyed the effects inventoried and delivered, in any view the property of J. C. Farr & Co. passed to the assignee.

Touching the third proposition, that this property was conveyed subject to the equity of the firm creditors, it would be beyond cavil, had the assignment shown upon its face a conveyance of the property of Farr and also of J. C. Farr & Co. for the benefit of creditors. As was said by Chief Justice Hornblower in *Scull v. Alter*, 16 N. J. L. 147, 150: "If it is an assignment, no only of the partnership effects and property of the firm, but also an individual and several assignment by the members of their respective and separate estates, then it must be treated as such. The estates and debts must be marshaled, the partnership effects applied, in the first instance, to the partnership debts, and the effects of each member applied, in the first instance, to the payment of his separate debts." See also *Garretson v. Brown*, 26 Id. 425, 435. But as this assignment speaks of all the property embraced in it as belonging to Farr alone, a different view might be taken of it. Usually, indeed, courts have held that an assignee for the benefit of creditors is not a purchaser for value, but takes the property subject to all equities that would have been valid

against the assignor: Notes to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 87. Many of the decisions to this effect, however, have gone upon the theory that debts proved under the assignment are not extinguished, except so far as they are paid by dividends, or that a pre-existing debt is not a valuable consideration for a conveyance; and as neither of these theories is tenable in New Jersey, there may be found sufficient reasons for holding, in this state, that a creditor, proving under an assignment, should be regarded in equity as favorably as a purchaser for value, although in *Vandoren v. Todd*, 3 N. J. Eq. 397, the opposite doctrine prevailed.

But conceding to the assignee, and to the individual creditors of Farr who have proved their debts, the rights of purchasers for value, they still are bound by the equity of the firm creditors, for they had notice of that equity. "The rule," says Professor Pomeroy (2 Pomeroy's Eq. Jur., sec. 753), "is universal and elementary, that if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interest under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration." That Arnold before the assignment, and all the personal creditors of Farr before they proved their claims, were notified that the Asbury Park property had belonged to J. C. Farr & Co., and had been transferred to Farr when that firm and all its members were insolvent, is fully established by the evidence in the cause. This notice before the assignment was acquired by Arnold from conversations with Farr, and by Arnold, and many, if not all, of Farr's individual creditors, through inquiries made by Eaton and Lawson, a committee appointed by the creditors to investigate the affairs of Farr and J. C. Farr & Co. After the assignment, but before any debts were proved, such notice was still more definitely communicated to all of Farr's creditors, through the report of their committee (Exhibit D, 5), in which the assets and liabilities of Farr, and of J. C. Farr & Co., respectively, are distinctly stated. This report also plainly indicates an understanding or expectation that the property assigned would be marshaled between the creditors of Farr and the creditors of the firm. It was made January 19, 1884, while the first claim proved was presented to the assignee January 28, 1884. Fuller notice than this report contained, of the equity of the firm creditors, could not well be given. Hence

those creditors are still entitled to have the partnership property applied to the payment of their debts, in preference to the debts of Farr's individual creditors.

The fourth proposition denies the right of the complainant to impeach this assignment.

The assignment was in the form sanctioned by our statute; it was for the benefit of all creditors who were entitled to any share in the property assigned; it created no preferences, and it provided for no delay beyond what was necessary for the execution of the trust which it properly declared. Although such assignments to hinder creditors from obtaining that priority of lien which otherwise their vigilance might secure, yet they are not on that account within the meaning and scope of the statute which avoids transfers to defraud creditors: 2 Pomeroy's Eq. Jur., sec. 994, note. The assignment was perfected before the entry of complainant's judgments, and as it operated to divest the legal title of the debtors, the complainant's executions did not become a lien. The assignment, as we construe it, placed all creditors of the same class upon an equal footing, and in such cases equality is equity. Consequently, both in law and in equity, the complainant is bound.

The conclusion of the matter is, that the property of Farr, and the property of J. C. Farr & Co., should be marshaled between the creditors of those two debtors respectively.

It only remains to consider whether the parties and pleadings in the cause are such as will warrant a decree to the foregoing effect.

The parties are Hagerman, Fielder, Farr, all their judgment creditors, and Arnold, the assignee, who represents the other creditors in all questions relating to the property assigned: *Pillsbury v. Kingon*, 33 N. J. Eq. 287; 36 Am. Rep. 556. These include all parties necessary for such a decree.

The primary design of the bill of complaint was to have the partnership effects subjected to the lien of the complainant's executions, and consequently it was filed on behalf of the complainant alone; while, in our judgment, the complainant has no peculiar lien, and has only a right, in common with all other partnership creditors, to have the partnership assets marshaled for their benefit; and therefore the bill should have been exhibited on behalf of the complainant, and all other creditors of the same class who might come in under it. But the bill sets out all the facts upon which our conclusion is founded, and one of its prayers is: "That, if necessary, a

receiver may be appointed to take charge of the business, assets, and effects of the said John C. Farr, and also those which were of the said J. C. Farr & Co., and which are claimed by said Arnold by virtue of said pretended deed of assignment, to manage, control, and dispose of the same under the direction of this honorable court."

This prayer is appropriate for the relief to which we think the complainant and the other firm creditors are entitled, and the lack of an averment that the suit is prosecuted on behalf of all such creditors may be remedied by so framing the decree as to secure for all who come in a ratable distribution of the partnership assets among them: *Hendricks v. Robinson*, 2 Johns. Ch. 283, 297; *Wetherbee v. Baker*, 35 N. J. Eq. 501, 508.

Let the decree appealed from be reversed, and a decree be entered in accordance with these views.

MAGIE, J., dissented. — 1. Because the bank had been guilty of laches in that while the assignment for the benefit of creditors was made on November 30, 1883, it did not file its present bill until May 30, 1884; meanwhile the individual creditors of Farr had exhibited their claims to the assignee, aggregating over eighty thousand dollars; 2. That the assets in the hands of Farr's assignee should not be marshaled, as directed in the opinion of the majority of the court, because such relief is not germane to the bill, and because the individual creditors of Farr are not parties to this proceeding; and 3. Because the assignment of Farr to his assignee should be deemed an assignment by him of property held in his individual capacity only, and not subject to the equities of the late partnership, or of its creditors.

FRAUD, WHAT IS. — The mere failure to perform a parol agreement made in good faith is not fraud: *Feeny v. Howard*, 79 Cal. 525; 12 Am. St. Rep. 162; nor does the mere failure to perform a covenant relate back and render the same fraudulent; but although a promise is not, strictly speaking, a representation, yet if one makes a promise in bad faith, never intending to perform it, he is guilty of fraud for which the contract may be rescinded: *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29, and see note 36, 37, for false representations for which a contract may be rescinded.

RESCISSION OF CONTRACTS. — As to the duty of a party who seeks rescission: *Johnson v. Evans*, 8 Gill, 155; 50 Am. Dec. 669, and extended note 672-681. As to how and when the right of rescission must be exercised: Note to *Bryant v. Ishburgh*, 74 Id. 657-662. A party to a contract who has the right to rescind it on account of fraud must exercise such right within a reasonable time after discovering the fraud; for a person defrauded must act promptly to repudiate a fraudulent transaction, and must do nothing in affirmance of the contract nor retain any benefits thereunder: *Young v. Arntze*, 86 Ala. 116; *Merrill v. Wilson*, 66 Mich. 232; *Thompson v. Peck*, 115 Ind. 512; *Hart v. Kimball*, 72 Cal. 283; *Paine v. Harrison*, 38 Minn. 346; *Sheffield etc. Co. v. Neill*, 87 Ala. 158; *Watson v. Baker*, 71 Tex. 739; *Bailey v. Fox*, 78 Cal. 389. One party to a contract cannot rescind without placing or offering to place the other party in *statu quo*: *Francis v. New York etc. R'y Co.*, 108 N. Y. 93; *Bailey v. Fox*, 78 Cal. 389; *Bell v. Keepers*, 39 Kan. 105;

Young v. Arntz, 86 Ala. 116; *Merrill v. Wilson*, 66 Mich. 232. Courts of equity have jurisdiction to rescind contracts for fraud: *Korne v. Korne*, 30 W. Va. 1; *Marsh v. Scott*, 125 Ill. 114; *Matthews v. Crockett*, 82 Va. 394; *Dakota etc. Co. v. Price*, 22 Neb. 96; *Cofer v. Moore*, 87 Ala. 705; *Cowles v. Barber*, 74 Iowa, 71; *Mohler v. Carder*, 73 Id. 582; or for a material change of the subject-matter of the contract brought about by one party without the assent of the other: *Harris v. Piatt*, 64 Mich. 105; or for non-performance: *Gray v. Suspension etc. Mfg. Co.*, 127 Ill. 187; but one cannot rescind a divisible contract for a breach of its conditions, unless such breach goes to the whole consideration: *Hansen v. Consumers' etc. Co.*, 73 Iowa, 77. And until a contract is fully performed on both sides, it is liable to be rescinded: *Lindsay v. Glass*, 119 Ind. 301; but a contract for the benefit of a third person cannot be rescinded so long as the promisor continues to receive the consideration from the original promisee: *Malone v. Crescent City etc. Co.*, 77 Cal. 38; nor can a purchaser rescind a contract releasing his vendor from an executory contract of sale, and substituting a new contract for other property, merely on account of fraudulent representations in procuring such release and substitution, unless damage or injury is shown sufficient to authorize such rescission: *Marriner v. Dennison*, 78 Cal. 202. Equity may refuse to rescind a contract when complainant fails to prove any injury resulting to himself by reason of the alleged fraud: *Simmons v. Hill*, 77 Iowa, 378. Where there has been no attempt to perform any part of a contract, and the time for its performance has expired, it may be treated as rescinded without giving any notice thereof to the non-performing party: *Kennedy v. Embry*, 72 Tex. 387.

BONA FIDE PURCHASERS, WHO ARE. — To be a *bona fide* purchaser, one must purchase without notice: *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57, and note; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375, and note; *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and note; *Young v. Kellar*, 94 Mo. 581; 4 Am. St. Rep. 405, and cases cited in note; *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71, and note; *Dugger v. Dugger*, 84 Va. 130; *Hume v. Franzen*, 73 Iowa, 25; *Green v. Green*, 41 Kan. 472; *Wilson v. Campbell*, 119 Ind. 286; *Strohm v. Good*, 113 Id. 93.

PARTNERSHIP. — Power of one partner to dispose of firm property for the payment of his individual debts, and the effect of such a disposal: *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38, and particularly note; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note; *Williams v. Lewis*, 115 Ind. 45; 7 Am. St. Rep. 403, and note. Firm creditors have superior rights and equities, with respect to partnership property, over the creditors of the individual members of the firm: *Rothell v. Grimes*, 22 Neb. 526; *First National Bank v. Brenneisen*, 97 Mo. 145; *In re Hooker's Assignment*, 75 Iowa, 377; but a chattel mortgage executed by all the partners upon all the partnership property, to secure the individual debt of one partner, if made in good faith in the absence of fraud, is valid, even though the partners are insolvent: *Purple v. Farrington*, 119 Ind. 164.

RICHARDS v. COLLINS.

[45 NEW JERSEY EQUITY, 282.]

THE RETURN OF A WRIT OF HABEAS CORPUS MADE UNDER OATH WILL BE TAKEN AS TRUE unless denied by the party against whom it is made. If a petitioner sees fit to bring on the hearing on the averments in the petition and the return, he must be considered as conceding the truth of all material facts stated in the sworn return.

HABEAS CORPUS FOR CUSTODY OF INFANT — ORDER WHICH MAY BE MADE —

When the subject of a writ of *habeas corpus* is a child, or other person not capable of self-protection, the court may take the subject of illegal restraint from the custody of one person and hand it over to another. The court may stop with a mere removal of restraint, or it may, in its discretion, go further, and determine, for the time being, the custody of the subject of the writ.

INFANTS — POWER OF CHANCERY OVER CUSTODY OF. — The court of chancery has an inherent jurisdiction with respect to the right of custody of children, and, in the exercise of this jurisdiction, may permanently fix the *status* of infants, even in disregard of the legal rights of parents, where the welfare of the infants requires it. Nor is it material to the exercise of this power in what way the subject is brought into court.

RIGHT OF PARENTS TO CUSTODY OF CHILDREN. — It is the strict legal right of the parents, and those standing *in loco parentis*, to have the custody of their infant children, as against strangers; but the court will not regard this right as controlling, when to do so would imperil the personal safety, morals, health, or happiness of a child.

CUSTODY OF CHILDREN, WISHES OF, WHEN WILL BE CONSIDERED IN DETERMINING. — When resolving the question what will best subserve the interest and happiness of a child, its own wish and choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment. The wishes of children of sufficient capacity should be given especial consideration when their parents have for a long time voluntarily allowed them to live in the family of another. A parent, by transplanting his offspring into another family, and surrendering all care of it for so long a time that its interests and affections attach to the adopted home, thereby seriously impairs his right to have its custody awarded to him by judicial decree.

Riker and Riker, for the appellant.

J. Frank Fort and James M. Fisk, for the respondents.

KNAPP, J. Upon the respondents' petition to the chancellor, the writ of *habeas corpus* went to the appellant, commanding him to have before the court Clara Belle Collins, a child of the petitioners, who, as the petition alleged, was in the appellant's custody, and restrained of her liberty. The appellant made return to the writ under oath, as required by the statute (Rev. 470, sec. 15), setting forth the causes and circumstances under which the said Clara was abiding in his family. No answer was filed to the return.

The first matter to be considered is the effect to be given to such return in deciding the controversy. The case proceeded to a determination before the vice-chancellor upon the petition and return.

The rule generally applicable to pleadings between parties in court is, that facts material in the cause, and formally averred in a pleading, unless denied by the party against whom they are pleaded, are, for the purposes of decision, accepted as true by the adjudicating tribunal. There seems to be no good reason for thinking the principle inapplicable in a proceeding of this character. In *Bennet v. Bennet*, 13 N. J. Eq. 114, upon a return made by the respondent to a writ of *habeas corpus*, the petitioner, upon the coming in of the return, applied for and had leave to file her answer traversing the return, and an order was made that either party might take testimony upon the answer being filed. So in *Baird v. Baird*, 18 Id. 194, the same course of practice was pursued.

These cases show the practice to be, to obtain leave to traverse the facts stated in the return, if the petitioner questions their truth. The court will grant this to the petitioner when the truth of the return is not conceded.

When the truth of the return is denied by answer, then an order to take testimony upon the issue of fact thus made is allowed. If the petitioner sees fit to bring on the hearing on the averments in the petition and the return (which he may do), he must be considered as conceding the truth of all material facts stated in the sworn return. Otherwise their truth could not be established, for the rule to take testimony is granted only when an issue of fact is formed. At common law the return to a writ of *habeas corpus* could not be controverted: Bac. Abr., tit. Habeas Corpus, sec. 13. The remedy for false return was an action on the case by the party, or by indictment. Subsequently, instead of indictment, the courts punished for false return as a contempt.

The decree in this case ordered the custody of the infant to be surrendered to its parents. It is said that the decree goes too far in any event when it does more than relieve from illegal restraint. The chancellor in this state exercises a concurrent jurisdiction with law judges on *habeas corpus*. No doubt it is true that in the ordinary use of the writ the court may content itself, where the subject of the alleged imprisonment is capable of self-protection, with a judgment or order freeing the person from illegal custody, and restoring him to liberty. But it is

quite clear that in this use of the writ judges have not refused to exert a larger power, and have quite frequently, in the case of children, taken the subject of illegal restraint from the custody of one and handed it over to another.

That this is, and from earlier times has been, the rule of practice on *habeas corpus*, is made apparent in the opinion delivered in the court of errors in *Baird v. Baird*, 19 N. J. Eq. 481, and also by the opinion of the chancellor in the same case in 18 Id. 481.

The court may stop with the mere removal of restraint, or in its discretion, may go further, and determine for the time being the custody of the subject of the writ.

But the court of chancery exercises a far more extended control in respect to the right of custody of children in virtue of an inherent jurisdiction over that subject. In the exercise of this higher authority, that court may permanently fix the *status* of infants even in disregard of the legal rights of parents, where the welfare of the infants requires it. Nor is it material to the exercise of this power in what way the subject is brought into court. In *Baird v. Baird*, 18 N. J. Eq. 481, the petition was to the chancellor as one of the judicial officers authorized by statute to issue the writ, and not to him in the exercise of the more general jurisdiction of the court of chancery. But the return to the writ and the answer to the return filed by the petitioner presented a case for the cognizance of the court in its more general jurisdiction. The chancellor doubted whether, in the proceeding, the general powers of the court of equity were invoked, yet, on appeal, the court of errors declared that when an issue is made by the pleadings, and proof on the question of the right to the permanent custody of infants, the case addresses itself to the general authority of equity as the public guardian of infants.

It becomes necessary, in this case, to determine in which of these aspects it stands before the court.

In my opinion, the pleadings present a controversy such as addresses itself to the general equitable powers of the court. The parties are claiming the right of permanent custody of the child, and they stand in a position to litigate that question. Facts sufficient for its decision are put upon the record. The case throughout has proceeded as one in the equity court. It was referred out of the court of chancery to one of the vice-chancellors, and the decree entered was upon his determina-

tion and advice. On this theory alone could the award of permanent custody have been decreed.

The case is within the rule of practice declared in *Baird v. Baird*, 21 N. J. Eq. 384.

Whatever decree there shall here be directed will, to the extent of its own terms, fix the future status of the child with some stability and permanence.

The decree below must then be tested by the principles which control in equity in disposing of the custody of infants.

Doubtless it is the strict legal right of parents and those standing *in loco parentis* to have the custody of their infant children as against strangers. This right will control the judgment of the court, unless circumstances of weight and importance connected with the welfare of the child exist to overbear such strict legal right.

The court will not regard the parental right as controlling, when to do so would imperil the personal safety, morals, health, or happiness of the child. In determining this delicate and often difficult judgment, the court looks at the character, condition, habits, and other surroundings of claimants.

In resolving the general question of what will best subserve the interest and happiness of the child, its own wish and choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment. There is no fixed age which capacitates such choice. It depends upon the extent of its mental development: *Commonwealth v. Hammond*, 10 Pick. 274; *Matter of McDowle*, 8 Johns. 328; *People v. Chegaray*, 18 Wend. 637.

The wishes of children of sufficient capacity to form them are given especial consideration, where the parents have, for a length of time, voluntarily allowed their children to live in the family of others, and thus form home associations and ties of affection for those having their care and nurture, and when it would mar the happiness of the children to sever such ties.

The relation of parent and child is regarded as not fully characterized by the relative duties of service and support. Nature's provision of mutual affection commonly exists as the incentive to parental and filial duty and the bond of family union. It is the instinct of childhood to attach itself and cling to those who perform toward it the parental office; and they become endeared to it by ministering to its dependence. A parent, by transplanting his offspring into another family.

and surrendering all care of it for so long a time that its interest and affections all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree. In a controversy over its possession, its welfare will be the paramount consideration in controlling the discretion of the court. The strict right of the parent will be passed by, if a judgment in observance of such right would substitute a worse for a better custodian.

Guided by the foregoing considerations, and accepting the facts set forth in the return to the writ as true, I am unable to agree with the court below in its disposal of this case.

The decree below, as it seems to me, regards nothing but the strict legal right of the parent, discarding as immaterial the circumstances which brought the subject of the writ into the appellant's family, and caused it to be kept and cared for from its birth until the issuing of this writ. Consideration should have been given to the fact that all it knew of home or family ties grew up with the parental care bestowed upon it by the appellant and his wife. The difference in the homes of the litigants, with the child's better prospect in life with its uncle and aunt, who have both the ability and the will to advance it, should have had weight in the decision. Clara was of an age and capacity to form a sensible choice, and her wish deserved consideration.

It is unnecessary, and of no profit, to do more than advert to the facts set forth in the return. It is not true that Clara ever came to the house of appellant by force or the procurement of himself or his wife. When Clara's mother was distressed by family trouble, she sought the house of her sister, Mrs. Richards, and there gave birth to her child. She asked this sister and the sister's husband to give it a home with them, to save it from becoming an object of public charity. They agreed to take it and rear it as their own child. They nursed and cared for it through helpless infancy. They watched over and provided for it as it grew in years. Whatever it has known of parental love and care is from them. It would be passing strange if it had not become bound to them and the home they gave it with a child's affection. They have faithfully executed their trust, and are still willing and abundantly able to provide for it and advance it in life. During all this time, the respondents, either through inability to give it a home or through indifference, have withdrawn themselves from it, and allowed it to become rooted in its foster

home. The true interest of Clara, under present circumstances, requires, in my judgment, that she remain in the appellant's family.

In my judgment, the decree below should be reversed, and a decree entered committing the custody of Clara to the appellant. Provision should be made in the decree for reasonable access of the petitioners to her, and the right should be reserved to the petitioners, in case of a material change of circumstances, to come into court for further direction and assistance.

This order reversed.

CUSTODY OF CHILDREN. — As to the right of parents to the custody of their children, generally: *Chapsky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321, and extended note 327-330; *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177, and extended note 183-187. The general rule is, that a father is entitled to the custody and control of his minor children: *Merritt v. Swimley*, 82 Va. 433; and where a father places his child in the care and custody of another, he is not estopped to afterwards reclaim it, although he verbally agreed to part with his right to the child's custody: *Brooke v. Logan*, *supra*; *Washaw v. Gimble*, 50 Ark. 351. The common-law rule as to the father's right to the custody of his minor children has been modified by the Pennsylvania statutes, which enact that when the father shall neglect or refuse to provide for them, the mother shall have the rights otherwise belonging to the father: *Eustice v. Plymouth Coal Co.*, 120 Pa. St. 299. As to the custody of minor children upon a separation of the parents: *McKim v. McKim*, 12 R. I. 462; 34 Am. Rep. 694, and extended note 698-702; *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48, and note. Yet the disposal of the care and custody of minor children rests in the sound discretion of the proper court: *Merritt v. Swimley*, 82 Va. 433; *Coffee v. Black*, 82 Id. 567; *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48. As to the custody of legitimate minor children upon *habeas corpus*: *State v. Smith*, 6 Greenl. 462; 20 Am. Dec. 324, and extended note 330-337; *Miller v. Wallace*, *supra*; *Brooke v. Logan*, *supra*. A writ of *habeas corpus* by a father for the custody of his minor child can and should be denied when it clearly appears to the satisfaction of the court that his custody would not be to the interests of such child: *Coffee v. Black*, *supra*; *Washaw v. Gimble*, *supra*; for the best interest and welfare of the child should be paramount to everything else: *Lambert v. Lambert*, 16 Or. 486.

HAGERMAN v. BUCHANAN.

[45 NEW JERSEY EQUITY, 292.]

VOLUNTARY CONVEYANCE, WHEN VOID AS TO SUBSEQUENT CREDITORS. — A voluntary conveyance or settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the minds of the parties, at the time of the execution of the conveyance, to thereby hinder, delay, or defraud the creditors of the grantor.

VOLUNTARY CONVEYANCE, BURDEN OF PROOF. — A subsequent creditor who seeks to attack and avoid a voluntary conveyance made by his debtor must assume the burden of proving an actual fraudulent intent on the part of the grantor to defraud some creditor.

VOLUNTARY CONVEYANCE, FRAUDULENT INTENT FROM WHAT PRESUMED. — In an attack upon a voluntary conveyance by a subsequent creditor, the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent.

VOLUNTARY CONVEYANCE, PRESUMPTION FROM GRANTOR'S EMBARKING IN HAZARDOUS BUSINESS. — The fact that the grantor enters into a hazardous business or engages in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent. This intent will not be inferred, however, if it appears that the grantor earnestly examined and sought to inform himself regarding the business into which he entered, and was led to believe that it was entirely safe.

Samuel A. Patterson and Henry G. Clayton, for the appellants.

Hawkins and Durand, for the respondents.

REED, J. The complainants below furnished lumber to J. H. Hagerman and Son between the dates of July 24, 1886, and November 29, 1886. On March 4, 1887, a judgment was recovered in the supreme court for the sum of \$958.53, the price of said lumber. Under a *fieri facias* issued thereon, a certain house and lot in Asbury Park was levied upon. The title to this property stood in the name of Sarah Hagerman, the wife of the defendant John H. Hagerman. It was conveyed to her by her husband, through an intermediate person, on July 17, 1883. The bill in this case was filed by Buchanan & Co., the judgment creditors, for the purpose of having the conveyance made by Hagerman to his wife declared void, upon the ground that it was made to hinder and delay creditors, and to have the property sold, and the proceeds applied to the payment of their judgment. The court below advised that the case stood in the same posture as that of *Demarest v. Terhune*, 18 N. J. Eq. 532, and that the rule adopted in that case was properly applicable to this. A decree was accord-

ingly made that the deed made by Hagerman to his wife should be regarded only as a security for the consideration actually paid by her.

It is perceived that the debt of the complainant was contracted over three years after the conveyance was made which is attacked. If the conveyance is to be regarded as in a degree voluntary, the creditor has a burden imposed upon him which would not exist had his debt antedated the deed. The character of a voluntary conveyance, when attacked by a creditor having a pre-existing claim, is definitely settled in this court. In the case of *Haston v. Castner*, 31 N. J. Eq. 697, after an elaborate review of the course of judicial sentiment in this state, it was decided that, in respect to debts existing at the date of a voluntary conveyance, the deed was void by force of the statute relating to frauds and perjuries. Against the attack of a creditor belonging to this class, neither the motive which induced the deed, nor the solvency of the grantor at the time of its execution, nor any other circumstance which might bear upon the *bona fides* of the parties to the conveyance, is important. Fraud is the legal conclusion arising from the contemporaneous concurrence of the two facts, namely, a voluntary deed and an existing debt due by the grantor.

In respect to the attitude which subsequent creditors bear towards a voluntary conveyance, there has not been, so far as I recall, a deliverance by this court. But the sentiment, both judicial and professional, is hardly less doubtful upon this than upon the former question. The rule which has been recognized is, that a voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the mind of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means of the deed. In the case of *Ridgway v. Underwood*, 4 Wash. C. C. 129, Judge Washington, after stating that he had examined the numerous cases which related to the operation of the statute (13 Elizabeth), remarked that, with entire satisfaction to himself, he had reached the following result: "A voluntary deed by a person indebted at the time to any amount is fraudulent and void as to such prior creditors, merely upon the ground that he was so indebted. But as to subsequent creditors, the deed is not void for that reason, because it does not necessarily or even rationally follow that the conveyance was fraudulently made with intent to hinder or delay creditors who became such long after the deed was made.

But if the case presents other circumstances from which fraud can legally be inferred, the voluntary conveyance will be avoided in favor of a subsequent creditor." This case was cited with approval by Chancellor Green in his opinion in the case of *Beekman v. Montgomery*, 14 N. J. Eq. 106.

In the case of *Reade v. Livingston*, 8 Johns. Ch. 481, 8 Am. Dec. 520, Chancellor Kent, after an elaborate view of the authorities, came to the conclusion, also, that, in respect to pre-existing creditors, a voluntary conveyance was fraudulent as a legal inference, and ought to be so far as it concerned existing debts, but that as to subsequent debts there was no such necessary legal presumption, and there must be proof of fraud in fact. Indebtedness existing at the time, although not amounting to insolvency, must be such as to warrant that conclusion. The view of the learned chancellor was, that while fraud would be imputed to the voluntary grantor, so far as the grant affected pre-existing debts, yet that the fact of the existence of such debts, and their relative amount in comparison with the property of the grantor remaining, were, as to debts subsequently arising, only facts which were important in determining whether there was an actual intent, at the time of the conveyance, to hinder and delay creditors. The doctrine of this case, so far as it dealt with the attitude of a voluntary grantor toward prior creditors, was adopted by this court in the case of *Haston v. Castner*, 81 N. J. Eq. 697.

The opinion in the former case was also noticed in the opinion in *Haston v. Castner*, *supra*, as one delivered by a distinguished judge upon a review of all the decisions then extant, and as one which had largely shaped the jurisprudence of this country upon this branch of equity jurisprudence. While it is true that the court was not dealing with the feature now under consideration, yet the distinction between the status of the two classes of creditors was a conspicuous feature in the opinion of Chancellor Kent. It promulgated a doctrine which embraced within its scope all creditors. The approval of the opinion of Chancellor Kent went far in the direction of an indorsement of his whole declaration, which constitutes a single and complete system touching the doctrine of voluntary settlements in respect to creditors of all kinds.

By reason of these recognitions of cases in which the distinction above mentioned has been formulated, and by reason of the rational grounds upon which such a distinction rests, I regard the complainant in this case as having the burden of

showing that, at the time the conveyance was made, there existed an actual intent to hinder and delay creditors. This conclusion appears the more reasonable after an examination of the cases in the English courts dealing with this subject. From such an examination it appears that while there has been considerable fluctuation in judicial sentiment in respect to the attitude of prior creditors who attack a voluntary conveyance, there is little or none in respect to the posture of subsequent creditors. As to the latter of the two classes of creditors, the rule has been quite uniform, that an actual fraudulent intent to defraud some creditor must be proved.

In an attack upon such a conveyance by a subsequent creditor, it is true that the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent. Different equity judges have accorded to the existence of such debts different degrees of probative force, and have raised from the fact of their existence certain indisputable presumptions, but the line of adjudications is opposed to the notion that the existence of a prior debt of any amount raises a conclusive presumption that a voluntary conveyance is fraudulent as against the attack of a subsequent creditor: *May on Fraudulent Conveyances*, 64.

The rule laid down by Chancellor Kent and Judge Washington is not only simple, but equitable.

A conclusive presumption against a voluntary conveyance should be raised in respect to those debts which it may be presumed were incurred upon the faith of the ownership of the property conveyed.

It is therefore inequitable that the debtor should be permitted to give away such property at the expense of a pre-existing creditor, whether the intention be good or otherwise. But as to creditors who become such without any possible inducement arising from such ownership, no such conclusive presumption should arise. No equitable consideration requires it; and besides, if such a rule be adopted, no settlement could be made which would not be at the mercy of the grantor during his lifetime. The power to incur debts would be a power to subject the property to a liability for their payment at any time. So, as already remarked, equitable considerations, as well as the weight of authority, are in favor of the rule that an actual intent to defraud, arising from all the circumstances surrounding the transaction, must be proved

before a voluntary conveyance will be decreed void at the suit of a subsequent creditor.

An observation seems appropriate in respect to the legal terms which are employed in dealing with these two classes of cases. Void voluntary conveyances, when spoken of in respect to either class of creditors, are styled fraudulent, but as to the former class there is said to be legal fraud, and as to the latter class, actual fraud.

There is force in the remark of Mr. Bigelow that the term "legal fraud" is a misnomer. The word "fraud" implies moral turpitude. When a transaction is voided by the statute without respect to the motive which induced it, but upon considerations of policy only, it is unlawful, and not fraudulent. To style it fraudulent, whether the fraud be legal or otherwise, may fix an unmerited stigma upon the party to the transaction. A more just and appropriate appellation to apply to conveyances of the former class would be simply unlawful, while the term "fraudulent" would still properly be applicable to the latter class of conveyances.

The question of fact remains to be considered, whether there was an intention existing in the mind of the parties to the present conveyance to hinder and delay creditors, which induced the execution of the deed. In the first place, the facts proved show that that conveyance was voluntary only in respect to a slight proportion of the value of the property sold. The wife, at the time of the conveyance, was a creditor of her husband. According to the testimony, the lot sold was worth about two thousand dollars. Mr. Hagerman says the house, outhouses, barns, and fences cost two thousand five hundred dollars. The whole property was worth from four thousand five hundred to five thousand dollars.

The claims of the wife against her husband were the following: She had owned property in Brooklyn before she and her husband removed thence to Asbury Park. In 1876 she sold this property, upon which there was a mortgage for five thousand dollars, for the sum of seven thousand four hundred dollars. The balance, amounting to two thousand four hundred dollars, she loaned to her husband. He gave her a mortgage to secure this loan, with the interest thereon, amounting together to the sum of \$2,814. There was upon this property, upon which the mortgage was given, another mortgage of six hundred dollars, which mortgage she paid from the proceeds of some building and loan association stock which she owned.

If interest be allowed her on her mortgage from December 6, 1879, to July 17, 1882, it would amount to \$610 more. There is nothing in the case to show that she should not be entitled to interest, as would any other mortgages.

It is true, she lived in the house, but nevertheless it was the home of her husband, and it was her home, because it was his home. She cannot be regarded as a mortgagee in possession. The husband owned the legal title, and was himself in possession of the property.

Nor does the fact that she took in boarders, and received compensation therefor, change this condition of affairs. She says that she expended the money so received in the care and reparation of the property. But if this be not so, it would not affect the position of the husband as the head of the family in possession; for if she took the proceeds of the boarders, it was the proceeds of her own labor, which the husband had the right to permit her to appropriate: *Peterson v. Mulford*, 36 N. J. L. 481; *Luse v. Jones*, 39 Id. 707.

Indeed, the reception of boarders seems to have been a mere incident of the housekeeping, and in no way diminished the value of the use of the property to Mr. Hagerman, but probably diminished the housekeeping expenses, which would otherwise have fallen legally upon him. So I regard the amount of the indebtedness of the husband to the wife as reaching to the sum of four thousand dollars.

I place the value of the house from four thousand five hundred to five thousand dollars, and I doubt if it would have brought more than the latter sum in the market. So the difference between the wife's claim and the value of the property which she received is not great.

But there is another fact which still further reduces the amount of this difference: the wife had her inchoate right of dower in the property, the value of which, of course, could not be applied to the payment of her husband's creditors. The fact of this encumbrance upon the property in some degree diminishes its salable value. So I think it appears true, as I have already remarked, that the voluntary element in this transaction is small, relative to the entire value of the property, and this is a material feature in solving the question whether the conveyance was fraudulent.

The point strongly insisted upon by the counsel for the complainants was, that it appeared that on the day the deed was given Mr. Hagerman entered into a partnership. He

became a member of the firm of J. C. Farr & Co. He gave for his interest in the firm two promissory notes of seven thousand five hundred dollars each, both amounting to fifteen thousand dollars. It appears that this firm became insolvent in three or four months thereafter. It is argued that this shows that Mr. Hagerman was entering upon a hazardous enterprise, and that this deed was made to place his property beyond the reach of future creditors.

Now, it is true that the fact that a person has entered into a hazardous business or engaged in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent. It evinces a desire to reap the benefit for himself if successful, and escape responsibility if unlucky. Nevertheless, each case must stand upon its own footing, and no legal rule can be adopted as to the quantity of proof or the particular complexity of facts which will annul a conveyance upon this ground. The character of the business, the degree of pecuniary hazard incurred, the amount of property remaining in the grantor, the value of the property conveyed, the acts and words occurring coincidentally with the transaction, are to be viewed together in solving the question of fraudulent intent.

Now, viewing these transactions together, I do not think such an intent has been proved. I think that Mr. Hagerman inquired, as he says he did, particularly about the business of Farr & Co., and that he tried to be careful not to involve himself in a precarious business.

I think it was only when he was convinced by the persuasions of Mr. Farr that it was entirely safe, and that the amount of his notes would be paid out of the proceeds, that he entered into the business. He says it was understood that the old firm had assets to the amount of forty thousand dollars, and that the liabilities which the new firm assumed were only fifteen thousand or twenty thousand dollars. Although in fact the business was risky, as the result disclosed, as Hagerman understood it at the time he became connected with it, it did not so present itself. He undoubtedly wished to place his wife in a position of security, as she had frequently requested. But this is the object of every settlement. She had no security for the six hundred dollars. Taking into consideration the fact that he says that he had eighteen hundred dollars in bank, and a lot worth six hundred dollars, that the voluntary elements in the conveyance are so small, and that he seems

to have been led to believe that the business he afterwards engaged in was entirely safe, I do not think it proved that the conveyance to his wife was induced by a fraudulent intent to hinder and delay creditors.

The decree below should be reversed.

VOLUNTARY CONVEYANCES. — 1. What Transfers are Voluntary. — A voluntary conveyance has been described as one made without any consideration whatever: *Jackson v. Peck*, 4 Wend. 300; *Shantz v. Brown*, 27 Pa. St. 123; *Seward v. Jackson*, 8 Cow. 406. The fact that a transfer was made upon an inadequate consideration is doubtless one which may be, and ought to be, considered by a court or jury in determining whether or not the transfer was made with intent to defraud the creditors of the grantor, and if, in connection with other circumstances, it satisfies them of such fraudulent intent, the transfer should be disregarded: *Washband v. Washband*, 27 Conn. 424.

The expression frequently to be found in the opinions of the courts and elsewhere, that a voluntary conveyance is one entirely without consideration, is, in our judgment, inaccurate and misleading. It cannot be that a nominal consideration, one which neither the grantee nor the grantor could have regarded as other than grossly disproportionate to the value of the property, is sufficient to give the transfer the same immunity from the attacks of creditors as one which is a fair equivalent for the property transferred. The consideration must be substantial, and though it is more than nominal, it may well be so inadequate as to convince any reasonable, unprejudiced person that the transfer was voluntary, either in whole or in part. Speaking of such a transfer, the court of appeals of the state of Maryland very justly said: "But it has been strongly urged in argument that this fact was an immaterial circumstance, and that the deed, if it rests upon a moneyed consideration, must be supported, even though that consideration bears no adequate relation to the real value of the property. This proposition, as a universal rule, is not correct, so far, at least, as third persons are concerned. It is true that it gives to the deed, in contemplation of law, the character of a bargain and sale, and subjects it to all the rules of interpretation and the like which govern such instruments. Nevertheless a deed, valid in all respects as between the parties, may be assailed in chancery by creditors solely upon the ground of inadequacy of consideration; as, for example, where land is sold and conveyed at private sale, as this was, and a consideration in money is received therefor palpably less than its real value or what it would bring at a public sale in the market. In such circumstances a court of equity will regard the transaction as evidence either of fraud or of a design on the part of the grantor to make a gift to the grantee of the difference between the price paid and the actual value of the property; and if the latter, the deed, to the extent of the difference, will be regarded as voluntary, or resting upon the consideration of natural love and affection. If this were not so, fraud could be perpetrated upon creditors with impunity, by converting the deeds based in fact upon the consideration of love and affection into those based upon a moneyed consideration, by merely agreeing to receive a trivial price in money for the property sold": *Worthington v. Bullitt*, 6 Md. 198.

There are some circumstances in which transfers will not be adjudged voluntary, though the consideration can hardly be considered of any value, as where a transfer is in payment of an obligation which could not have been enforced, and which the grantor might have omitted to discharge had he

thought proper. We think it a mistaken view of the proper relation of a debtor to his creditors to leave him at liberty, as self-interest or caprice may suggest, to withdraw his property from his creditors having enforceable claims, and devote it to the discharge of claims which are supported merely by a moral obligation, and which probably would never have been discharged had not approaching insolvency warned the debtor that he could not hope to keep the property as his own. These moral obligations constitute a perpetual menace to creditors having claims enforceable by action, while they confer no rights on their holders except such as the caprice or self-interest of the debtor may from time to time concede. He can, of course, make any terms or come to any understanding he chooses with the holders of them. As these holders have no means of coercing payment, they will grant him any concession he may suggest. He may go on and do business and obtain credit, because his assets are far in excess of all liabilities which can be enforced against him, and having made purchases on credit, he may turn the proceeds of the purchases over to the payment of claims, from which he had long been practically released, through the operation of the statute of limitation, or of a discharge in bankruptcy or insolvency proceedings. The theory of the adjudications upon this subject is, that, notwithstanding the operation of the statute or of the discharge, the debt yet remains, and that the debtor has merely obtained the privilege of pleading the discharge or statute, as he may deem proper; that this is a privilege which his creditors have no right and no power to compel him to exercise; and that he may, therefore, pay the debt either in money or by the transfer of the whole or any part of his property; and unless the transaction is otherwise objectionable, they have no cause of complaint: *Wilson v. Russell*, 13 Md. 494; 71 Am. Dec. 645; *Keen v. Kleckner*, 42 Pa. St. 529; *Uplike v. Titus*, 13 N. J. Eq. 151; *Shearon v. Henderson*, 38 Tex. 245; *French v. Motley*, 63 Me. 326; *Brookville National Bank v. Trumble*, 76 Ind. 195.

So if the transfer is made to discharge an obligation which the debtor might have escaped by pleading the statute of frauds, it must be deemed supported by a valuable consideration. "The cases seem to establish the rule that a conveyance or security given for a debt or in fulfillment of a contract which could have been recovered or enforced in an action were it not for some legal maxim or statutory provision which prevents such recovery by reason of the contract not being in the form prescribed by the statute, — in other words, not being evidenced in the manner prescribed by law, — is not a voluntary conveyance or security, and therefore fraudulent and void as to creditors, if the evidence shows that there was a sufficient consideration for the debt or promise to support the same were it not for the statutory requirements": *First National Bank v. Bertsch*, 52 Wis. 438; *Goff v. Rogers*, 71 Ind. 459; *Lefferson v. Dallas*, 20 Ohio St. 68; *Cresswell v. McCaig*, 11 Neb. 222; *Livermore v. Northrup*, 44 N. Y. 107; *Stowell v. Hazlett*, 57 Id. 637.

It is, perhaps, not correct to say that a mere moral obligation is a sufficiently valuable consideration to support a transfer and to relieve it from the imputation of being voluntary. The obligation must be one which is legal and enforceable but for some statutory defense which the debtor may elect to waive, as where, to avoid liability, he must plead or otherwise urge the statute of frauds or of limitations, or a discharge under a statute relating to bankrupts or insolvents. Therefore, if a debtor has been released by a composition agreement entered into between him and his creditors, though the moral obligation to pay them is not less obvious than if such release resulted from proceeding in insolvency or bankruptcy, a conveyance of which a debt,

thus released by his creditors, is the sole consideration, is voluntary: *King v. Moore*, 18 Pick. 376; *Nightingale v. Harris*, 6 R. I. 321.

A consideration valuable in the eyes of the law does not necessarily consist of money or property, and there is at least one consideration, which, though not consisting of money nor property, and while in many instances of great value, doubtless sometimes enables the grantor to reserve a substantial benefit for himself at the expense of his creditors. We refer to the consideration of marriage. Marriage has always been regarded as a valuable consideration. Therefore a conveyance made by one person to another in consideration that the latter will marry him is supported by an adequate consideration, and unless otherwise fraudulent, cannot be avoided by the creditors of the grantor. Whatever obligations either of the parties have entered into by an antenuptial marriage settlement has the same rank and dignity as if their consideration consisted of money or other property. Hence nothing that either does, either before or after the marriage, in fulfillment or satisfaction of this obligation, is voluntary, in the judgment of the law. "Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bona fide*, and without notice of fraud brought home to both sides, it becomes unimpeachable by creditors": *Magniac v. Thompson*, 7 Pet. 393; *Eppes v. Randolph*, 2 Call, 103; *Bunnell v. Withrow*, 29 Ind. 123; *Barrow v. Barrow*, 2 Dick. 504; *Pierce v. Harrington*, 58 Vt. 649; *Frank's Appeal*, 59 Pa. St. 190; *Lockwood v. Nelson*, 16 Ala. 294; *Dyert v. Remerschneider*, 32 N. Y. 629; *Spears v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206; *Satterthwaite v. Emley*, 4 N. J. Eq. 489; 43 Am. Dec. 618; note to *Merritt v. Scott*, 50 Id. 372; *Michael v. Morey*, 29 Md. 239; 90 Am. Dec. 106; *Jenkins v. Clement*, 1 Harp. Eq. 72; 14 Am. Dec. 698; *Prewitt v. Wilson*, 103 U. S. 22; *Gibson v. Bennett*, 79 Me. 302.

The fact that an intended husband who makes a marriage settlement is at the time financially embarrassed, and that it embraces the greater portion of his estate, certainly does not render it voluntary, nor does it necessarily impress upon such settlement the stigma of actual fraud. If, however, the wife knew of her intended husband's financial difficulties, the court or jury would doubtless be left to determine, from all the attendant circumstances, whether the settlement was fraudulent or not: *Herring v. Wickham*, 29 Gratt. 528; 26 Am. Rep. 40; *Jones's Appeal*, 62 Pa. St. 324; *Campion v. Cotton*, 17 Ves. 264; *Fraser v. Thompson*, 4 De Gex & J. 659.

It is not essential that the marriage be consummated to entitle the intended wife to the benefit of a marriage settlement, or to property conveyed to her in consideration of her promise of marriage. The consideration of the conveyance may consist of the promise of one party to marry the other, and when this is the case, the consideration is not incapacitated from sustaining the conveyance by the fact that the death of one of the parties, or some other supervening cause, prevents the fulfillment of the promise: *Smith v. Allen*, 5 Allen, 454; 81 Am. Dec. 758; *Connor v. Stanley*, 65 Cal. 183.

The consideration of marriage is not necessarily confined to the parties to the contract of marriage. A parent may settle property on his child in view of her marriage, and the settlement will be presumed to have been in contemplation of a marriage which follows soon afterward: *Hopkirk v. Randolph*, 2 Brock. 132. Even if the gift is made years before marriage, and during

the infancy of a daughter, and when no particular marriage could have been in contemplation, and she subsequently marries, such conveyance, from the date of such marriage, ceases to be voluntary, and is not subject to successful attacks by creditors or purchasers whose rights have their inception after the marriage: *Welles v. Cole*, 5 Gratt. 645; and it is even doubtful whether the conveyance is open to attack by those who were creditors of the grantor immediately preceding the marriage: *Huston's Adm'r v. Cantril*, 11 Leigh, 136; *Fones v. Rica*, 9 Gratt. 568.

If a marriage settlement is made after, in pursuance of articles entered into or letters written before, a marriage, it is not voluntary, and can withstand the attack of creditors: *Kinnard v. Daniel*, 13 B. Mon. 499; but a settlement made after marriage, not supported by any valid agreement previously entered into, is voluntary, and subject to the same infirmity as any other voluntary transfer or agreement: *Gugen v. Sampson*, 4 Fost. & F. 974.

A consideration which will relieve a deed from the charge of being voluntary must be legal. It cannot consist of a contract forbidden by law or public policy: *Weeks v. Hill*, 38 N. H. 199; *Jose v. Hewett*, 50 Me. 248. Hence a transfer to a mistress in consideration either of past or future intercourse is voluntary: *Wait v. Day*, 4 Denio, 439; *Potter v. Garcia*, 58 Ala. 303; 29 Am. Rep. 748; *Sherman v. Barrett*, 1 McMull. 47; *Hargroves v. Meray*, 2 Hill Ch. 222.

Though no moneyed or property consideration for a transfer exists, it is not voluntary if made in pursuance of a duty resting on the grantor. Thus if he is a mere trustee, having no beneficial interest in the property, his conveyance to his *cestui que trust* is not voluntary: *Seeders v. Allen*, 98 Ill. 468. Whatever the grantor can be compelled to do, he may do, without any other compulsion than such as results from the knowledge on his part of the existence of the duty, and of the power of the one to whom he owes it to resort to the proper tribunals to enforce its performance. Therefore, if one who holds lands or other property is a mere trustee of the legal title, or if he has entered into some agreement the performance of which can be specifically enforced, he need not wait until suit has been brought against him before he conveys to the *cestui que trust*, or to the person otherwise entitled to a conveyance; and if he conveys without compulsion, his creditors are not injured, and have no ground upon which to avoid the conveyance: *Forbush v. Williams*, 16 Pick. 42; *McConnell v. Martin*, 52 Ind. 434; *Bancroft v. Curtis*, 108 Mass. 47; *Jackson v. Ham*, 15 Johns. 261; *Gudgel v. Kitterman*, 108 Ill. 50; *Caffal v. Hak*, 49 Iowa, 53; *Norton v. Mallory*, 63 N. Y. 434; *Syracuse Chilled Plow Co. v. Wing*, 85 Id. 44; unless the grantee has by some act or omission estopped himself from insisting upon his rights as against the creditors of the grantor: *City National Bank v. Hamilton*, 34 N. J. Eq. 158.

There are cases where parties are entitled to specific performance of gifts made or agreed to be made to them, or at least to have executed the muniments of title constituting the final evidence of such gifts. When such a case has arisen, any conveyance or other evidence of the transmission of title which the donor executes is not voluntary. Thus if a gift is made of lands, and the donee enters into possession, makes valuable improvements, and does such acts as entitle him to the specific performance of the gift, the donor may then make the conveyance requisite to vest the donor with the title, and those who were not creditors of the donor when the gift was originally made, and possession taken, cannot complain: *Dosier v. Watson*, 94 Mo. 328; 4 Am. St. Rep. 388; *Van Bibber v. Mather*, 52 Tex. 406; *Kinealy v. Macklin*, 89 Ma.

433; *Dougherty v. Harsel*, 91 Id. 161. If, however, the gift rests in mere promise or in an intent to give, not so fully executed that the donee can compel its consummation, then any instrument executed or act done to complete the gift is voluntary, and can be assailed as successfully as if the intent to give had not previously existed: *Rucker v. Abell*, 8 B. Mon. 566; 48 Am. Dec. 406; *Davis v. McKinney*, 5 Ala. 719; *Hubbard v. Allen*, 59 Ala. 283; *Worthington v. Bullitt*, 6 Md. 172.

A transfer may be made by one person to another, without any consideration, to accomplish some temporary and perhaps unlawful purpose, and with the expectation, expressed or implied, that the grantee will, at some future time, when the purpose has been effected, reconvey to the grantor; and then the question may arise whether, if the grantor does so reconvey, his conveyance is voluntary, and subject to attack as such. In an early case in New York, wherein it appeared that a transfer had been made for the purpose of qualifying the donee to be a voter, it was held that his creditors had no right to object to a retransfer, where he had never taken possession of the property nor acquired any credit based upon his supposed ownership of it: *Jackson v. Ham*, 15 Johns. 261. The better rule, however, in our judgment, is, that if the transfer is good between the parties, as, for example, where the transfer is made for the purpose of defrauding creditors, so that the grantor has no power to compel a reconveyance, then if the grantee does reconvey, his act is voluntary, and may be assailed as such by his creditors: *Susong v. Williams*, 1 Heisk. 625; *Chapin v. Pease*, 10 Conn. 69; *Allison v. Hagan*, 12 Nev. 38; *Maher v. Borard*, 14 Nev. 324.

What Creditors may Attack a Voluntary Transfer as Fraudulent. — When a conveyance actually or constructively fraudulent is sought to be avoided, one of the first questions to be considered is, whether the person seeking to avoid it is, within the meaning of the law upon this subject, a creditor entitled to relief. To constitute one a creditor, it is not necessary that money be due to him from the debtor at the time of the transfer. It is sufficient that the debtor has entered into some obligation or done some act which may result in his liability to the creditor. When the liability is ascertained, it relates back to the inception of the original agreement or obligation, and entitles the creditor to proceed as though there had been a debt due and payable to him at that time: *Note to Greer v. Wright*, 52 Am. Dec. 116.

“The term ‘creditors,’ as employed in the statutes and decisions concerning fraudulent and voluntary conveyances, is not used in any narrow or technical signification, but includes all persons whose interests might be defrauded by the transfer. Wherever there exists a right or obligation for the invasion or disregard of which a judgment may be entered, a transfer made with the view of rendering such judgment ineffectual is doubtless fraudulent, and therefore void as against the interest sought to be defrauded. Thus if one has committed any tort for which he may be answerable in damages, the person entitled to recover such damages is a creditor, and as such, in proceeding to obtain satisfaction of a judgment for such damages, may treat as void any transfer made with a view of hindering or delaying him in his attempt to realize such satisfaction: *Barling v. Bishopp*, 29 Beav. 417; *Fox v. Hills*, 1 Conn. 295; *Westmoreland v. Powell*, 59 Ga. 256; *Bongard v. Bloch*, 81 Ill. 186; 25 Am. Rep. 276; *Weir v. Day*, 57 Iowa, 87; *Cook v. Cook*, 43 Md. 522; *Hoffman v. Junk*, 51 Wis. 613; *Harris v. Harris*, 23 Gratt. 737; *Patrick v. Ford*, 5 Sneed, 532, note. Hence a transfer to prevent the satisfaction of a judgment which might be recovered against the grantor for a slander uttered by him: *Walradt v. Brown*, 1 Gilm. 397; 41 Am. Dec. 190;

Lillard v. McGee, 4 Bibb, 165; *Farnsworth v. Bell*, 5 Sneed, 531; or for seduction or breach of promise of marriage: *Lowry v. Pinson*, 2 Bail. 324; 23 Am. Dec. 140; *Smith v. Culbertson*, 9 Rich. 106; *Hoffman v. Junt*, 51 Wis. 613; *Greer v. Wright*, 6 Gratt. 154; 52 Am. Dec. 111; *McVeigh v. Retenon*, 40 Ohio St. 107; or for alimony, or other moneys to which a wife is entitled from her husband: *Boog v. Boog*, 78 Iowa, 524; *Feigley v. Feigley*, 7 Md. 537; 61 Am. Dec. 375; *Sanborn v. Lang*, 41 Md. 107; *Taylor v. Wild*, 8 Beav. 159; *Draper v. Draper*, 68 Ill. 17; *Chase v. Chase*, 105 Mass. 385; *Bonslough v. Bonslough*, 68 Pa. St. 495; *Livermore v. Boutelle*, 11 Gray, 217; 71 Am. Dec. 708; *Tyler v. Tyler*, 126 Ill. 525; 9 Am. St. Rep. 642; *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; *Boils v. Boils*, 1 Cold. 284; *Picket v. Garrison*, 76 Iowa, 347; *ante*, p. 220; *Plunkett v. Plunkett*, 114 Ind. 484, — may be regarded as fraudulent and void.

“Sometimes it has been held that one having a claim for a tort is not entitled to protection as a creditor, unless he has commenced an action for the damages occasioned to him thereby: *Hill v. Bowman*, 35 Mich. 191, in which case the opinion is, upon this subject, a mere dictum. This question has not been very carefully considered; but, upon principle, there seems to be no reason for attaching any importance to the pendency of the action, except that the known pendency of an action renders it more probable that the transfer was fraudulent, and intended to avoid a claim which the parties had reason to believe would be prosecuted to judgment. But a plaintiff is no more a creditor after commencing an action than before. His cause of complaint, whatever it may be, must exist anterior to the commencement of his action, and is of precisely the same character after such commencement as before. If any change takes place in the cause of action, it cannot be prior to its merger in the judgment. Nor does the mere pendency of the action create any lien upon any property. The better opinion, therefore, is, that one having a claim for a tort is a creditor before the commencement of an action thereon as well as after, and, as such creditor, is, upon recovering judgment, entitled to avoid a fraudulent transfer antedating the commencing of his action: *Corder v. Williams*, 40 Iowa, 582; *Shean v. Shay*, 42 Ind. 375; 13 Am. Rep. 366.

“If a judgment is based on a contract, the judgment creditor's right to be treated as a creditor relates back to the date of the execution of the original contract. Hence he may treat as void any fraudulent transfer executed subsequent to the contract on which the judgment was based. The transfer cannot be supported by showing that when it was made the judgment creditor's debt had not become due: *Howe v. Ward*, 4 Me. 195; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 381; or that his claim was contingent, and it could not then have been known that any cause of action against him would ever result from the contract. Therefore, if a bond be given, a fraudulent transfer made subsequently, but before breach of its condition, may be avoided as well as if executed after such breach: *Thompson v. Thompson*, 19 Me. 244; 36 Am. Dec. 751; *Stone v. Myers*, 9 Minn. 303; 86 Am. Dec. 104; *Carlisle v. Rich*, 8 N. H. 44; *Anderson v. Anderson*, 64 Ala. 403; 38 Am. Rep. 797; *Soden v. Soden*, 34 N. J. Eq. 115. The same rule prevails where the liability of the fraudulent grantor, at the date of the grant, was contingent: *Bibb v. Freeman*, 59 Ala. 612; *Post v. Stiger*, 29 N. J. Eq. 554; as where he was a surety or indorser, and it was not known that he would ever be called upon to pay the debt. *Jackson v. Seward*, 5 Cow. 67; *Oramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594; *McLaughlin v. Bank*, 7 How. 220; *Bay v. Cook*, 31 Ill. 336; *Gibson v. Love*, 4 Fla. 217; *Crane v. Sickles*, 15 Vt. 252;

Curd v. Miller's Ex'r, 7 Gratt. 185; *Kiel v. Larkin*, 72 Ala. 403. The liability of a grantor under his covenant of warranty does not differ in principle from other contingent liabilities, and a fraudulent conveyance made at any time after such covenant ought to be regarded as void as against a judgment thereon: *Rhodes v. Green*, 36 Ind. 7; *Gannard v. Kelava*, 20 Ala. 741; *contra*, *Bridgford v. Riddell*, 55 Ill. 261.

"If debts exist when a fraudulent conveyance is made, a change in their form, or in the person to whom they are due, is immaterial. Subsequent creditors from whom means were obtained to pay off the antecedent creditors are entitled to treat the conveyance as void": Freeman on Executions, sec. 137 a; *Paulk v. Cook*, 39 Conn. 566; *Barhydt v. Perry*, 57 Iowa, 416; *Mills v. Morris*, Hoff. Ch. 419; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733; *McElhove v. Sutton*, 2 Bail. 128. So if the grantor of a voluntary conveyance is then indebted to one with whom he continues to do business and to have an account, and the payments afterwards made by the debtor are sufficient, if applied to the debt existing at the transfer, to extinguish it, but by reason of subsequent purchases by or other proper charges against the grantor the balance due from him exceeds that due at the date of the transfer, then the creditor has all the equity of one whose debt wholly antedated the transfer: *Whittington v. Jennings*, 6 Sim. 493; 3 L. J., N. S., 157.

If the creditor who is seeking to avoid a voluntary conveyance as fraudulent has commenced an action and taken out a writ of attachment, or has recovered judgment and had an execution issued thereon, he may levy his writ as though such conveyance had not been made. "As against a fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, — not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all": Freeman on Executions, sec. 136.

The creditor may, however, prefer to proceed to have the character and validity of the transfer judicially and conclusively determined before proceeding to sell the property. He may file a bill in equity and have the transfer declared void as against him: *Stock Growers' Bank v. Newton*, 13 Col. 245; *Sockman v. Sockman*, 18 Ohio, 382; *Henderson v. Dickey*, 50 Mo. 161; *Swift v. Arents*, 4 Cal. 390; *Gormley v. Potter*, 29 Ohio St. 597; *Gallman v. Perrie*, 47 Miss. 131. He is not entitled to do this under the mere allegation that he is a creditor. He must, if possible, reduce it to a judgment, and thereby establish its existence beyond controversy. The exceptions to this rule are rare, and mostly result from statutory innovations: Freeman on Executions, secs. 426, 427.

Voluntary transfers may in some instances be avoided both by prior and by subsequent creditors. If a transfer is made for the purpose of hindering, delaying, or defrauding the creditors of the grantor, it may be avoided by any of his creditors, prior or subsequent: *Gruber v. Voyles*, 1 Brev. 266; *Beecher v. Clark*, 12 Blatchf. 256; *Fox v. Mayer*, 54 N. Y. 125. If, however, it is shown that there was no actual intention on the part of the grantor to hinder, delay, or defraud his creditors, or to accomplish any other fraudulent purpose, it becomes material to inquire whether the creditor who is seeking to avoid a voluntary conveyance was such at the time it was made or became such afterwards. We wish first to consider when a voluntary conveyance may be avoided by pre-existing creditors. If a creditor, undertaking the collection of his debt, finds himself wholly or partly unable to collect it without

resorting to property which his debtor has voluntarily conveyed to another, a case has arisen in which it appears more than probable that a voluntary transfer is the cause of the delay or inability to collect the debt. The original tendency of the authorities was to regard a voluntary conveyance as indisputably fraudulent and void as against a creditor, who, on its account, finds himself hindered or delayed in the collection of his debt. And even at the present time it is doubtful whether in some of the states a voluntary transfer can be upheld under any circumstances, when to uphold it is to prevent a creditor from obtaining payment of a pre-existing debt: *Chamley v. Dunsany*, 2 Schoales & L. 714; *Lockhard v. Beckley*, 10 W. Va. 87; *Spurr v. Willows*, 3 De Gex, J. & S. 293; *Marmon v. Harwood*, 124 Ill. 104; *Cox v. Cunningham*, 27 W. Va. 206; *Cook v. Johnson*, 12 N. J. Eq. 51; 72 Am. Dec. 481; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Lang v. Brown*, 21 Ala. 179; 56 Am. Dec. 244; *Crawford v. Kirksey*, 55 Ala. 182; 28 Am. Rep. 704; *Huggins v. Perrine*, 30 Ala. 396; 66 Am. Dec. 131; *Reade v. Livingston*, 3 Johns. Ch. 481; 8 Am. Dec. 520; *O'Daniel v. Crawford*, 4 Dev. 197; *Kissam v. Edmondson*, 1 Ired. Eq. 180; *Bogard v. Gardley*, 4 Smedes & M. 302; *Russ v. Bromberg*, 88 Ala. 620. This is the safer and better rule, though it has no doubt been relinquished in the majority of the states in favor of transfers made by a husband or father to his wife or children, or other persons dependent upon them, and who are the natural objects of his bounty, where it is shown almost beyond a reasonable doubt that the transfer was made in good faith, without any intention to defraud or embarrass creditors, prior or subsequent, and in the reasonable belief that the donor's estate was ample to discharge all liabilities existing against it without rendering necessary a resort to the property voluntarily transferred.

While, as shown in the preceding paragraph, voluntary transfers have in some of the states been adjudged to be indisputably void as against pre-existing creditors, irrespective of the financial condition of the grantors at the time when they were made, the great weight of authority at the present time is, that such transfers are *prima facie* fraudulent, and those seeking to support them must do so by any competent evidence sufficient to satisfy the court or jury with whom the decision of the question rests that the transfer in question is not fraudulent. In other words, the mere fact of the existence of a prior indebtedness does not conclusively establish the fraudulent character of the transfer, and inevitably deprive it of all power to harm pre-existing creditors: *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545; *Clayton v. Brown*, 17 Ga. 217; *Jones v. Clifton*, 101 U. S. 225; *Hunters v. Waite*, 3 Gratt. 26; *Weed v. Davis*, 25 Ga. 684; *Salmon v. Bennett*, 1 Day, 525; 7 Am. Dec. 237; *Van Wyck v. Seward*, 6 Paige, 62; *Filley v. Register*, 4 Minn. 391; 77 Am. Dec. 522; *Hinde's Lessee v. Longworth*, 11 Wheat. 190; *Cole v. Tyler*, 65 N. Y. 73; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 49; *Holmes v. Penney*, 3 Kay & J. 90; 3 Jur., N. S., 80; 26 L. J. Ch. 179; but it does burden the transfer with the presumption of fraud, and prevent its assertion against such creditors, unless this presumption is satisfactorily removed: *Cole v. Tyler*, 65 N. Y. 73; *Goodman v. Wineland*, 61 Md. 419; *Hillinger v. Crowl*, 17 Id. 361; *Hunters v. Waite*, 3 Gratt. 26; *Mathews v. Torinus*, 22 Minn. 132; *Oliver v. Moore*, 23 Ohio St. 473; *Spence v. Dunlap*, 6 Lea, 457; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; 39 Am. Dec. 250; *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177; *Walah v. Byrnes*, 39 Minn. 527. The general rules applicable for this subject are very well stated in the following extract from the opinion of Baldwin, J., in *Hunters v. Waite*, 3 Gratt. 32: "The law gives no general lien to creditors upon the property of their debtors, though it enables them to obtain satisfaction there-

from by the proper judicial proceedings. It does not restrain a man's dominion over his own property so long as he acts with fairness and good faith; but it treats as null and void all fraudulent contrivances to screen it from the pursuit of his creditors. It is fraudulent to defeat them by reservations of benefits to himself; it is equally fraudulent to defeat them by benefactions conferred upon others. It is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as against creditors. However valuable the consideration, if the conveyance be designed to delay, hinder, or defeat creditors, it is void; and though the conveyance be voluntary, yet if made with fairness and good faith, it is unimpeachable. The intent with which an act is done may be a conclusion of law from certain facts, against which conclusion all other evidence is unavailing; or it may be a presumption of law from other facts, which is *prima facie* only, and liable to be repelled by sufficient evidence. If a man who is in insolvent circumstances conveys away his property to strangers, or settles it upon his wife or children, the law concludes the design to be fraudulent against his creditors, and all evidence to the contrary is idle or delusive; and so if he render himself insolvent by a voluntary conveyance, however meritorious in itself merely. It is in vain to speculate upon his motive, or adduce evidence of an honest purpose. It may be that he had acted through ignorance or mistake or misconception. Apologies and excuses may be found to absolve him from moral turpitude; but to these the law cannot listen. He is bound to know his own circumstances and the just demands against him; and the injustice and wrong to his creditors are palpable and unquestionable. On the other hand, if a man is in flourishing or unembarrassed circumstances, and exercises a reasonable and prudent discretion in gifts and advancements to his children, adapted to their wants, and justified by his means, leaving an ample fund for the payment of his debts, there can be no propriety in the conclusion of a fraudulent purpose from the mere fact of indebtedness at the time. Still, as it is difficult to ascertain the exact state of a man's pecuniary circumstances at the time of his making a voluntary conveyance, as the claims of creditors are strong, and the devices of fraud are numerous and often plausible, there ought to be a leaning against the protection of property from the pursuit of creditors, and a preliminary presumption in their favor, throwing the burden of establishing the fairness and good faith of the transaction upon the adverse party. This he may do by satisfactory proofs of the donor's ample resources, the moderation of his gift, and his freedom from embarrassment; and in the attempt to do this, he may be met by marks or badges of a fraudulent purpose."

When a voluntary transfer is void as against creditors, whether prior or subsequent, its invalidity does not depend upon the insufficiency of consideration, but upon the presumed intent of the grantor. And here it must not be forgotten that it is the inference or intent which must be drawn from the circumstances that controls, rather than the actual intention of the grantor. The language of some of the authorities on this subject seems at first irreconcilable, for we sometimes find them asserting that the intent of the grantor is immaterial, and at other times declaring that it is controlling. This apparent contradiction arises from the employment of the word "intent" in the one case to denote the absence of all evil motives on the part of the grantor, and in the other case to denote the motive which the court or jury must impute to him from his financial condition at the time of the transfer in question. If the transfer must necessarily or probably hinder, delay, or defraud the grantor's creditors, it is void as against them, however innocent his inten-

tion or worthy his motive in making it: *Potter v. McDowell*, 31 Mo. 62; *Churchill v. Wells*, 7 Cold. 370; *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155; *Patten v. Casey*, 57 Mo. 118; *Cole v. Tyler*, 65 N. Y. 573; *Freeman v. Pope*, L. R. 5 Ch. App. 538; L. R. 9 Eq. 206. He has no right to hinder, delay, or defraud them, and his voluntary transfer will not be sustained if that result might reasonably have been apprehended when it was made.

With respect to the grantee of a voluntary conveyance, as he has paid no consideration therefor, he has no equities paramount nor even equal to those of the pre-existing creditors of the grantor. His intent is therefore immaterial, and the conveyance to him must stand or fall, according to the presumed intent of his grantor. The grantee cannot support it by proving his entire innocence and his want of all knowledge of the intent or circumstances of the grantor: *Thomson v. Dougherty*, 12 Serg. & R. 448; *Swartz v. Hazlett*, 8 Cal. 118; *Wise v. Moore*, 31 Ga. 148; *Clark v. Chamberlain*, 95 Mass. 257; *Hicks v. Stone*, 13 Minn. 434; *Peck v. Carmichael*, 9 Yerg. 325; *Gamble v. Johnson*, 9 Mo. 597; *Laughton v. Harden*, 68 Me. 208; *Woody v. Dean*, 26 S. C. 499.

As a voluntary transfer must either be enforced or disregarded, according to the intent which must be imputed to the grantor at the time it was executed, it is of the utmost importance to ascertain from what circumstances the fraudulent intent should or should not be presumed. If the grantor is at the time financially embarrassed, if there are judgments rendered or actions pending against him or suits threatened, his voluntary conveyance is unquestionably fraudulent and void as against creditors: *Bobannon v. Combs*, 79 Mo. 305. To render a voluntary transfer fraudulent, it is not essential that the grantor be insolvent at the time of making it. "If a debtor is in embarrassed circumstances, and makes a voluntary conveyance, and is afterwards unable to meet his debts owing at the time of the assignment, in the ordinary course prescribed by law for their collection, or is reduced to that condition that an execution against him would be unavailing, such conveyance is void as to those debts, and the property conveyed is subject to their payment": *Potter v. McDowell*, 31 Id. 62. "It is sufficient to show that the grantor was embarrassed or in doubtful circumstances, and was not possessed of ample means outside of the particular property for the satisfaction of his then existing debts. When this condition of affairs is proven to exist, the conveyance in question—although none but the purest motives may have prompted its execution—becomes fraudulent in law, and is open to attack, and can be successfully assailed by all who were creditors at the time of the execution of the conveyance, and whose debts remain unliquidated and incapable of collection in the ordinary course of proceedings": *Patten v. Casey*, 57 Id. 118.

As the object of evidence concerning the debtor's inability at the date of the transfer is to enable the court or jury to judge what his intent was in making it, and as no conclusive presumption of fraud arises from the fact that he was somewhat indebted at the time, it is evident that the precise amount of indebtedness necessary to avoid such transfer cannot be stated, and that different courts or juries may reach diverse conclusions from the same state of facts. If, after a transfer, the grantor still continued to be the owner of property sufficient to pay his debts, and was not about to embark in some business in which he expected to contract additional liabilities, and this transfer is assailed by a pre-existing creditor, whose debt remains unpaid, it must be left to the jury or the court to determine as a question of fact, from all the attendant circumstances, whether the intent of the grantor

was fraudulent or not: *Sanders v. Wagonseller*, 19 Pa. St. 248; *Lerow v. Wilsmont*, 9 Allen, 382; *Chambers v. Spence*, 5 Watts, 404; *Mateer v. Hissim*, 3 Penr. & W. 160; *Posten v. Posten*, 4 Whart. 27; *Pomery v. Bailey*, 43 N. H. 118. The general principle which ought to govern courts and juries in determining this question has been thus stated by the court of appeals of Kentucky: Although the grantor "may not at the time have been insolvent, or so much involved at the date of the deed as to render the residue of his estate then necessarily insufficient to pay his debts, yet if he was involved 'to a material extent,' by which we are to understand an extent which might, in view of ordinary contingencies, endanger the rights of his creditors, then the deed was constructively fraudulent as to subsequent as well as pre-existing debts; for in such a case a fraudulent intent is implied; and the deed was void for express fraud, if from the extent of the grantor's indebtedness, compared with his means of paying, the unreasonableness of the conveyance as an advancement to the appellant, considering the claims of other children, and other attending circumstances, the inference is justified that the grantor made the conveyance for the purpose of avoiding the payment of his liabilities": *Lowry v. Fisher*, 2 Bush, 70; 92 Am. Dec. 475.

No case has come within our observation in which a voluntary transfer has been sustained against a pre-existing creditor when the grantee was not a member of the grantor's family, and as such the natural object of his bounty; nor, on the other hand, have we met with any case declaring that such a transfer could not be upheld because made to a stranger. Doubtless the fact that the donee is bound to the donor by the ties of consanguinity or even affinity is worthy of great consideration, because it is natural and commendable for one whose financial standing enables him to do so to provide for and secure against want in the future the members of his family, and it is more probable that a voluntary transfer to them may have been made without any fraudulent intention than a like transfer to a stranger. If, however, a voluntary transfer should be made to one not related to the grantor, and not especially entitled to his benefaction, and from the grantor's financial ability at the time, and from all the surrounding circumstances, the court and jury should be convinced of the absence of all fraudulent intent, we see no reason for denying the validity of the transfer, though the grantor may have been indebted at the time, provided that such debts bore an inconsiderable ratio to his remaining assets.

The right of a husband or father to make conveyances to his wife or children, notwithstanding the existence of indebtedness against him at the time, is now well established in a majority of the states. Still these gifts cannot be sustained if they embrace all the grantor's property, or even if he is financially embarrassed, or if he ought, as a prudent, practical man, to foresee that they will result in some of his creditors being deprived of the means of obtaining payments of their debts. One has no right to be generous, even to the members of his family, if his generosity will probably be at the expense or detriment of his creditors: *Marmon v. Harwood*, 124 Ill. 104; 7 Am. St. Rep. 345; *Howe v. Wassman*, 10 Mo. 169; 49 Am. Dec. 126; *Lewis v. Love*, 2 B. Mon. 345; 38 Am. Dec. 161.

Though it is doubtful whether the property which the grantor retains may not be sufficient to discharge all his liabilities, a voluntary conveyance to his wife and children must be pronounced fraudulent, if the amount of his indebtedness is large, and he is fearful that his property may not be sufficient to pay it, and especially if his conceded insolvency follows within a short time after the execution of the voluntary transfer: *Stewart v. Rogers*, 25 Iowa,

395; 95 Am. Dec. 794; *Driggs v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78. If, on the other hand, the property to which the grantor retains the title after making a voluntary transfer is at the time unquestionably sufficient to discharge all his liabilities, and the transfer is no more than a reasonable gift in view of his remaining assets, his ability to earn money, and the demands which are likely to be made upon him, then the transfer should be sustained, unless it appears from other circumstances to have been made for a fraudulent purpose: *Gridley v. Watson*, 53 Ill. 193; *Cole v. Tyler*, 65 N. Y. 78; *Arnett v. Wauett*, 6 Ired. 41; *Winchester v. Charter*, 97 Mass. 140; *Taylor v. Eastman*, 92 N. C. 601; *Miller v. Pierce*, 6 Watts & S. 101; *Walsh v. Ketchum*, 84 Mo. 427; *French v. Holmes*, 67 Id. 186; *Miles v. Richards*, Walker, 477; 12 Am. Dec. 584; *Morgan v. Hecker*, 74 Cal. 540.

Though a donor is considerably indebted at the date of the transfer, if he continues solvent for a long period of time afterwards, during which his creditors might have obtained payment of his debt by the exercise of ordinary diligence, they, after lying supinely by until their debtor's position is changed from one of comparative affluence to one of insolvency, cannot wrest from the voluntary grantees of the latter property which he had transferred to them, without at the time of the transfer depriving himself of the means to fully satisfy all his creditors: *Kyleberger v. Kilder*, 1 Hill Eq. 113; 26 Am. Dec. 192; *Lloyd v. Fulton*, 91 U. S. 479.

It remains for us to consider when a voluntary transfer may be avoided by a creditor of the grantor, who was not such at the time it was made. Here, as in the case of pre-existing creditors, the inquiry is concerning the intent of the grantor, as it must be inferred from all the circumstances, both prior and subsequent, which may properly be considered as throwing light upon such intent and revealing its character. For if it be established that the purpose of a voluntary transfer was to hinder, delay, or defraud the creditors of the grantor, then it must, as a general rule, be adjudged void as against subsequent as well as against prior creditors. Subsequent creditors may therefore avoid a voluntary transfer made by their debtor by satisfactorily establishing that it was made with a design to defraud the grantor's pre-existing creditors: *Bassett v. McKenna*, 52 Conn. 437; *Wyman v. Brown*, 50 Me. 139; *Lowry v. Fisher*, 2 Bush. 70; 92 Am. Dec. 754; *Barling v. Bishop*, 29 Beav. 417; *Hutchinson v. Kelly*, 1 Rob. (Va.) 123; 39 Am. Dec. 250; *Vertner v. Humphries*, 14 Smedes & M. 130; *Carpenter v. Roe*, 10 N. Y. 227; *Parish v. Muphee*, 13 How. 92; *Walsh v. Byrnes*, 39 Minn. 527; *Day v. Cooley*, 118 Mass. 524; *Dewey v. Moyer*, 72 N. Y. 70; *Marston v. Marston*, 54 Me. 476. While the rule as thus stated is expressed without limitation in many of the adjudged cases, we think it is necessarily subject to several limitations or qualifications. A voluntary or even a fraudulent transfer is not absolutely void; it is valid and effectual between the parties. The utmost which can reasonably be claimed in favor of subsequent creditors is, that it shall not be permitted to operate as a fraud upon them. A voluntary conveyance may have been intended as a fraud upon then existing creditors, without, as we think, making it necessarily fraudulent as to subsequent creditors. The voluntary transfer may have been made so long prior to the contracting of a subsequent debt that it is impossible to conceive that it could have been made with a view of contracting it. And where this is the case, we do not understand how it can properly be regarded as fraudulent as against this subsequent creditor, nor upon what principle he may be permitted to disregard it, if he had notice of it, or did not permit the debt to be contracted in the reasonable belief that his debtor was still the owner of the property which had been long

previously transferred. In other words, it seems to us that a voluntary transfer, fraudulent and void as against existing creditors, is not forever thereafter void as against subsequent creditors, however remote the creation of their debts may have been from the execution of the conveyance.

The grantor in a voluntary deed may part with all possession and dominion over the property, or, when it is real estate, the grantee may cause the conveyance to be recorded, and thereby impart notice of its existence to all subsequent purchasers and creditors of the grantor. In either event, all subsequent creditors of the grantor have notice of his existing financial condition. They have no reason to expect that the property which has thus been transferred can be made available to them for the satisfaction of their debts. Knowing that the debtor no longer has this property, they may contract with him or not, as they may think best, in view of his apparent financial condition. It is difficult, therefore, to understand how they can be defrauded by the prior transfer of which they are thus notified. It has been said that if they have notice of the transfer, they also have notice that it was fraudulent as against pre-existing creditors, and that it is therefore void, and that they may therefore go on contracting with the grantor upon the assumption that the apparent conveyance is in fact no conveyance at all, because it was fraudulent and void in its inception. But the better rule, we think, is, that creditors who contract debts under such circumstances that the knowledge of previous voluntary transfers must be imputed to them cannot be regarded as hindered, delayed, or defrauded by such transfers, and therefore cannot avoid them for the purpose of obtaining collection of their debts: *Schumberg v. Beberstein*, 51 Tex. 457; *Lewis v. Castleman*, 27 Id. 407; *Monroe v. Smith*, 79 Pa. St. 459; *Snyder v. Christ*, 39 Id. 499; *Fowler v. Stoneum*, 11 Tex. 478; 62 Am. Dec. 490; *Lewis v. Simon*, 72 Tex. 470; *Baker v. Gilman*, 52 Barb. 39; *De Garcia v. Galvan*, 55 Tex. 53; *Bullett v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412. If, on the other hand, a conveyance of real estate is not recorded so as to impart constructive notice thereof to subsequent purchasers and creditors, or if, in the case of a voluntary gift of personal property, the donor remains in possession, exercising the same dominion over it which other owners exercise over like property, then subsequent creditors may undoubtedly assail the transfer as fraudulent upon as favorable terms as if they had been creditors whose debts existed before the transfer which they seek to assail: *Seale v. Robinson*, 75 Ala. 363; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733.

As we have heretofore shown, a voluntary transfer by one who is indebted at the time is presumed to be fraudulent as against pre-existing creditors. Whether a transfer by one in like circumstances is presumed fraudulent or not as against subsequent creditors, is a question less easily answered from the authorities. The principal case, as well as some others, favors the rule that a subsequent creditor must assume the burden of proving that a voluntary transfer which he seeks to avoid was fraudulent as against him; or in other words, that it was made when the grantor had a purpose to subsequently contract the liability in question, and to defraud his creditors thereby: *Crawford v. Beard*, 12 Or. 447. See also *Nicholas v. Ward*, 1 Head, 323; 73 Am. Dec. 177.

It has sometimes been held that if the facts are shown to be such as to render a transfer fraudulent as against prior creditors, it will be presumed also to be fraudulent as against subsequent creditors; that is to say, it will be presumed to have been made with the intent of contracting subsequent debts, and of delaying, hindering, and defrauding subsequent creditors: *Rogers v.*

Verlander, 30 W. Va. 619; *Edwards v. Entwistle*, 2 Mackey, 43; *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569.

We apprehend that no general rule can be formulated equally applicable to all cases, and that such judicial declarations as have been made upon the subject must be interpreted with reference to the particular facts of the case in which they were made. If the subsequent debts were contracted long after the voluntary transfer was made, the presumption that it might have been made with a view of contracting them and of defrauding the subsequent creditors certainly becomes exceedingly weak, and may reasonably be treated as entirely destroyed, unless other circumstances appear to give it renewed vitality. The evidence may, on the other hand, disclose that the subsequent debts have merely taken the place of prior ones, or that the debtor has continued or embarked in a business in which his becoming indebted was inevitable, or there may be other circumstances of the like persuasive character creating or strengthening the presumption that as the transfer was in fraud of prior it was also in fraud of subsequent creditors. In the one class of cases, the courts are likely to insist that the transfer must be assumed as valid as against subsequent creditors, and that they must rebut this assumption. In the other class, the courts are almost inevitably led to presume that the transfer was fraudulent as against prior creditors, and to call upon the donee, or those claiming under him, to overcome such presumption.

In some of the states, the presumption that a deed shown to be fraudulent as against existing creditors is also fraudulent and void as against subsequent creditors is given very great, if not absolutely conclusive, force, if the grantor was at the time largely indebted or seriously embarrassed, or if the property so transferred constituted the whole or even a greater part of his fortune: *Vertner v. Humphries*, 14 Smedes & M. 143; *Lusk v. Wilkinson*, 5 Ves. 387; *Holloway v. Millard*, 1 Madd. 417.

In *Rogers v. Verlander*, 30 W. Va. 619, it appeared that the grantor executed a voluntary conveyance of more than two thirds in value of his real estate, and that he had no personal property, and that within less than a year thereafter executions were issued against him, and returned unsatisfied. The court was convinced that the property which he retained was not ample to satisfy all his existing creditors, and that the inference was justified that the voluntary gift was intended not only to hinder, delay, and defraud his existing creditors, but that it was also actually intended to defraud his future creditors. The English cases also support the rule that if the grantor was insolvent at the time he made a voluntary conveyance, or if the transfer must be regarded as unreasonable in amount and value, considered with reference to his remaining fortune, then the presumption is justified that the transfer was intended to defraud subsequent as well as prior creditors: *Spirer v. Willows*, 3 De Gex, J. & S. 293; *Taylor v. Coenen*, 34 L. T., N. S., 18. So in Connecticut, when it appears that the grantor was largely indebted and insolvent, and that he gave away the only means of his satisfying his creditors, and that the grantee knew of his financial condition, it will be presumed, either that the grantor was incapable of managing his affairs, or incompetent to make a conveyance, or that he made it "under some secret hope or expectation of benefit to himself from the use of the property, or some equivalent for it after the conveyance"; and that the transaction is corruptly fraudulent, and that "if the grantor, at the time the deed was made, was indebted to the extent of insolvency, or perhaps of great embarrassment, so as to create a reasonable presumption of a fraudulent design,

the deed may be impeached even by a subsequent creditor, unless the presumption is repelled by showing that such prior debts were secured by provision in their favor in the deed itself": *Ridfield v. Bush*, 35 Conn. 222; 36 Am. Dec. 241.

These are extreme views, and in our judgment not sustainable upon principle. Before subsequent creditors can avoid a transfer, it must appear to be at least probable that it may have been made with a design to hinder, delay, or defraud them. Though the grantor has no other property, and never expects to have any, his conveyance cannot be fraudulent if he owes no debts, does not meditate the contracting of any, and is not in any business nor about to enter upon any business in the transaction of which he is likely to become indebted: *Thompson v. Allen*, 103 Pa. St. 44; 49 Am. Rep. 116.

If the creditor is but little indebted at the time of making a voluntary transfer, and there are no attending nor immediately subsequent circumstances to create a suspicion of meditated fraud on his part, such transfer cannot be successfully attacked by subsequent creditors: *Dodd v. McCross*, 8 Ark. 83; 46 Am. Dec. 301; *Pelham v. Aldrich*, 8 Gray, 515; 60 Am. Dec. 206. If the grantor is entirely free from debts, the case is still more clear, if possible. There not only cannot be any presumption in favor of such subsequent creditors that the transfer was fraudulent; the presumption must necessarily be the other way, unless it appears that the grantor was about to enter upon some business or meditated some scheme in which he was about to become indebted, and was seeking in some manner to throw the hazard of such business or scheme upon his subsequent creditors instead of assuming it himself, as he should in good faith do: *Smith v. Vedgers*, 92 U. S. 183; *Rock Island Stone Co. v. Walrod*, 75 Iowa, 479; *Martin v. Oliver*, 9 Humph. 561; 49 Am. Dec. 717; *Gilligan v. Lord*, 51 Conn. 502; *Wheeler & W. M. Co. v. Monahan*, 33 Wis. 198.

There is no doubt that a creditor who becomes such after an involuntary transfer had been made by him may attack and overthrow it by establishing that it was fraudulent as to him: *Lewis v. Simon*, 72 Tex. 40. And there are instances, as we have heretofore shown, where the debtor's doubtful financial condition may cast the burden of proof upon the donee or his successors in interest: *Moritz v. Hoffman*, 35 Ill. 559; *Stillman v. Ashdown*, 2 Atk. 481. The most familiar instances of a voluntary conveyance being declared fraudulent as against subsequent creditors are those arising when the transfer is made with a view of embarking in some hazardous business, of becoming indebted therein, and in case the business shall prove unprofitable, of escaping from loss through the aid of such previous transfer: *Mackay v. Douglas*, 41 L. J. Ch. 590. "A settlement on a wife on the eve of a new business, and with a view of providing against its contingencies, is as unavailing against new creditors as against old ones": *Littleton v. Littleton*, 1 Deara. & B. 327; *Block v. Nease*, 37 Pa. St. 433; *Graham v. O'Keefe*, 16 Irish Ch. 1; *Murphy v. Abraham*, 15 Ir. Eq., N. S., 571; *Moritz v. Hoffman*, 35 Ill. 558. If a conveyance is "made in anticipation of becoming indebted, and for the purpose of defrauding creditors, and without consideration, it matters not whether the grantor was insolvent or not, and the conveyance is void as against subsequent creditors. Hence, where a debtor in failing circumstances made a conveyance of his property to his mother without consideration, and the next day after the execution of this deed received a loan of money, for which loan he had previously negotiated, it was held that it might fairly be inferred, from the circumstances attending the execution of the deed and the making of the debt, that the conveyance was made in anticipation of becoming

indebted, and was therefore fraudulent as against the debt subsequently contracted": *Merrill v. Kibner*, 113 Ill. 318. "But a voluntary deed may likewise be void as to creditors whose claims are contracted subsequent to its execution. If the grantor of such a deed executes it in the expectation of shortly contracting debts, and with the design of so placing the property so conveyed that if misfortune afterwards befalls him, and he becomes unable to pay his debts, it shall be beyond the reach of his creditors, the deed will be held void on the ground of fraud. To illustrate: if a person just on the eve of embarking in a business which requires both capital and credit to conduct it successfully, should, by a voluntary conveyance, strip himself of a large portion of his property, and make it over to his wife, or distribute it among his children, and then procure the conveyance to be withheld from record, so that he might still trade upon the property as its owner, and in the interval incur debts beyond his ability to pay, the transaction would furnish such cogent evidence of fraud against both grantor and grantee that no court would allow the deed to stand for an instant against the persons who had been defrauded by it. The law on this subject is established. A citation of authorities is only useful to show how the law has been applied in particular instances": *City National Bank v. Hamilton*, 34 N. J. Eq. 160; *Muller v. Wilson*, 44 Pa. St. 413; 84 Am. Dec. 416; *Beechman v. Montgomery*, 14 N. J. Eq. 106; 80 Am. Dec. 229.

The mere fact that a grantor has become indebted after making a voluntary transfer, and that he is unable to pay such debts, is not conclusive in favor of subsequent creditors. To so hold would place prior and subsequent creditors on the same footing. The grantor may not have intended, when he made the transfer in question, to embark in any business or to become indebted to any extent whatever. If so, his conveyance could not have been fraudulent as against subsequent creditors: *Horn v. Ross*, 10 Ga. 210; 65 Am. Dec. 64. The court or jury must be left to determine, from the fact of the subsequent indebtedness, its proximity to or remoteness from the transfer, and all the other circumstances disclosed at the trial, whether the creation of the debt was contemplated at the time of the transfer or not. If it was contemplated, its holder occupies a position not less advantageous than if he were a prior creditor.

GEORGE v. BRADDOCK.

[45 NEW JERSEY EQUITY, 787.]

CHARITABLE USE, WHAT IS. — A DEVISE OF PROPERTY, TO "CONSTITUTE A SACRED TRUST for the express purpose of spreading the light of social and political liberty and justice in these United States of America," creates a charitable use.

CHARITABLE USE. — THE ONLY RESTRICTION WHICH HAS BEEN IMPOSED ON DEVISES FOR THE BETTER DISTRIBUTION OF SPECIFIED WRITINGS OR BOOKS is, that the writings to be circulated must not have, when considered with respect to their purpose, a general tendency of hostility to religion, law, or morals.

CHARITABLE USE. — THE COURTS WILL PERMIT THE ENFORCEMENT OF A TESTAMENTARY USE which is designed to circulate works calling in question fundamental rules and establishments of the law, and agitating the question whether such law has or has not any better foundation than wrong and injustice.

A DEVISE OF PROPERTY TO BE USED IN DISTRIBUTING OVER THE LAND the publications of Henry George on the land question and cognate subjects will be sustained and enforced, though all such publications teach doctrines antagonistic to the law, in this, in teaching that the earth belongs to all mankind, and is an inalienable heritage, and that no private ownership can rightfully exist therein.

BILL seeking a judicial exposition of a will. The clause considered in the opinion of the court is as follows: "Lastly. All the rest and residue of my estate, of any and every form, kind, and description whatsoever, I hereby give, devise, and bequeath, under the name of 'The Hutchins Fund,' to Henry George, the well-known author of Progress and Poverty, his heirs, executors, and administrators, in sacred trust, for the express purpose of 'spreading the light' on social and political liberty and justice in these United States of America, by means of the gratuitous, wise, efficient, and economically conducted distribution all over the land of said George's publications on the all-important land question and cognate subjects, including his Progress and Poverty, his replies to the criticisms thereon, his Problems of the Times, and any other of his books and pamphlets which he may think it wise and proper to gratuitously distribute in this country; provided, first, that said George, his heirs, executors, and administrators, shall regularly furnish true annual reports of the management and disbursement of the said 'Hutchins Fund' to the paper called 'The Irish World and the American Industrial Liberator,' or its acknowledged successor, and shall also annually mail or otherwise send a copy of said paper containing such annual report to each of the following persons, to wit: my aforementioned wife, Mary Hutchins, now of this place; William S. Wood, now of Parker, county of Randolph, state of Indiana; and James Hutchins, now of Selma, county of Delaware, and state of Indiana; and provided, second, that said George, his heirs, executors, and administrators, shall cause to be inserted or printed opposite the title-page of every free copy of his books distributed by means of this fund, this my solemn request, virtually, to wit, that each recipient shall read it, and then circulate it among such neighbors or other persons as in his best judgment will make the best use of it."

John T. Woodhull, Samuel W. Beldon, and James F. Minturn,
for the appellant.

George A. Vroom, for William S. Braddock.

S. C. Woodhull and D. J. Pancoast, for Mary Hutchins.

C. V. D. Joline, for James Hutchins.

BEASLEY, C. J. This is an executor's bill, seeking a judicial exposition of the last will, which he is called upon to execute.

The instrument in question was executed by one George Hutchins, whose domicile, at the time of his death, was in this state. It is dated the twenty-eighth day of February, 1887, and it contains a residuary clause that is set forth at large in the statement of facts prefacing this opinion. In that clause, the testator has set apart property to be devoted to the propagation of certain designated works, as will hereafter appear; and the question propounded to this court is, whether such testamentary disposition is to be established as a charitable use.

It is familiar learning that, from the enumeration of certain subjects in the statute of Elizabeth, and from the judicial expositions of that act, there have been evolved certain defined classes of testamentary gifts that are now universally admitted to be, in the estimation of the law, charitable uses. With regard to such classes, debate and doubt have ceased; and consequently all examination of the grounds upon which such classification has been justified would, at the present time, be profitless, and nothing better than empty pedantry. For it is obvious that the instance now before this court belongs, so far as the testamentary intent is concerned, to one of such established classes. The testator's direction is, that the property designated by him shall "constitute a sacred trust for the express purpose of spreading the light on social and political liberty and justice in these United States of America." That such a purpose is a charitable use, according to the legal import of those terms, is self-evident, in view of the present state of the decisions on that subject.

Consequently, if there be any illegality in this testamentary disposition, of necessity it must reside in the methods contrived by the testator for the fulfillment of such legitimate purpose. Those methods are described by the testator in these words, viz.: "The gratuitous, wise, efficient, and economically conducted distribution all over the land of said George's publications on the all-important land question and cognate subjects, including his Progress and Poverty, his replies to criticisms thereon, his Problems of the Times, and any

other of his books and pamphlets which he may think it wise and proper to gratuitously distribute in this country."

It is now urged that the doctrines taught in the works thus designated are of such a character that the court will not permit their dissemination.

The inquiry thus started should be preceded by a consideration of the rule or test applicable in such affairs.

It is plain that such rule has but little to do with the ordinary canons of criticism. For present purposes, the scientific or literary value of these works is not to enter into the account. If I should say that I have concluded, which is the truth, that these works of Mr. George have greatly elucidated and enriched, in many ways, the subjects of which they treat, and that they are very valuable contributions to the science of economics, it would not be shown that a step had been taken in the path of present duty. It is not to be doubted that the public circulation, by virtue of a charitable use, of the works of Sir Robert Filmer, which maintain the divine right of kings, would be entitled to the judicial *imprimatur* equally with a treatise on government under the signature of John Locke. It matters not in the least to judicial inquiry whether the instrumentalities appointed by the donor to fulfill his purpose be good or bad, fit or unfit; whether they be the best possible, or the worst possible. In this particular, the largest discretion resides, and properly resides, in the creator of the trust. These public benefactions are properly regarded as matters of great interest to the community, as entitled to the most favorable reception by the courts, and to their amplest protection. It is not surprising, therefore, that it has heretofore been understood that the entire restriction imposed by the law on such donations is that comprised in a single sentence: The writings to be circulated must not be, when considered with respect to their purpose and general tendency, hostile to religion, to law, or to morals. The rule, in this definite form, in my opinion, has been, by repeated adjudications, thoroughly established; and the only difficulty inherent in the subject is to properly select the writings to which it is applicable.

Regarding, then, this principle of proscription as settled, the question arises, Has it been applied by the vice-chancellor in the present instance?

It has not been, and could not be reasonably, alleged that the writings now in question are either sacrilegious or im-

moral; but the argument proceeded exclusively on the theory that the doctrines they teach are antagonistic to the law. It was urged that this was the case by reason of the hypothesis of this author respecting the title to land. The view on that subject expressed by Mr. George is, that the earth belongs to mankind, and is a heritage that is inalienable, and that consequently one generation, or a series of generations, of men cannot, either by act or omission, debar a succeeding generation from claiming its own. The doctrine, therefore, inculcated is, that no private, absolute ownership in land can rightfully exist, the consequence being that the public, as the real proprietor, has the right to regain possession of all property of this nature by the use of any legal method.

The decree appealed from avoids the charitable use attempted to be created, and the principle of decision is thus stated in the opinion pronounced,—the vice-chancellor says: "Clearly, the author, in these passages, not only condemns existing laws, but denounces the fact that the secure title to land in private individuals is robbery,—is a crime. It is this aspect of the case which leads me to the conclusion that the court ought to refuse its aid in enforcing the provisions of this will. Whatever might be the rights of the individual author in the discussion of such questions in the abstract, it certainly would not become the court to aid in the distribution of literature which denounces as robbery—as a crime—an immense proportion of the judicial determinations of the higher courts. This would not be legally charitable. Society has constituted courts for the purpose of assisting in the administration of the law, and in the preservation of the rights of citizens, and of the public welfare; but I can conceive of nothing more antagonistic to such purpose than for the courts to encourage, by their decrees, the dissemination of doctrines which may educate the people in the belief that the great body of the laws which such courts administer concerning titles to land have no other principle for their basis than robbery."

A simple glance at the rule of judgment here propounded will suffice to show that it is one of entire novelty. It does not appear to have been suggested, or even alluded to, in any former consideration of the subject. Stripped of unnecessary terms, in its ultimate analysis it promulges this far-reaching principle, that a court of law will not, in view of the purposes for which it was instituted, lend its aid, by its decree, to the

agitation of the question whether the laws which it is in the habit of executing have or have not any better foundation than wrong and injustice. In this analysis I have, of course, disregarded the presence of the term "robbery" in the foregoing quotation, that gives the *ratio decidendi* in the court below, because I am well aware that the learned vice-chancellor did not put his judgment, either in whole or in part, upon a mere epithet, or turn of phrase. I have also put, in a general form, the judicial proposition, because it would be manifestly absurd to declare that the courts will not assist in providing for a discussion of the existing title to land, but that such refusal does not extend to the discussion, in a similar way, of the title to personalty and personal rights. It seems inevitable that the proposed principle of judgment must be applicable to the whole field of established law, if it be applicable to any part of it.

And before leaving this formula that embraces the ground of decision in the court below, it is important to observe that its expressions convey the idea that all that the court does or is required to do in these instances is to refuse to aid in the circulation of the writings that are impugned, and that in this respect they are misleading; for what the court does is to adjudge that it is not permissible for any person to make provision for such circulation. The decree in this case frustrated the will of this testator; declared his trust void, and diverted the property invested in it in other directions. It would seem, therefore, that the rule in question should have been, and if it is to be adopted must be, thus formulated: that a court of equity will not permit the fulfillment of a testamentary use that is designed to circulate works that call in question any of the fundamental rules and establishments of the law.

The vice-chancellor educes this principle from a consideration of the functions and constitution of judicial tribunals; and if I were to stand on that ground and indulge in speculation, it must be confessed that my conclusion would be the opposite of that which he has arrived at. I cannot perceive for what reason it is incompatible with judicial position to aid, if invested with such power, in the circulation of the works of a learned and ingenious man putting under examination and discussion any part of the legal system. It would not seem to me that, as a judge, I was called upon to discard the use of means in the development of the law which, in every other science, are regarded as absolute essentials. With

respect to all intellectual creations, embracing, of course, laws and judicial institutions, the most potent of all forces tending to improvement and evolution are those of examination and discussion; and recognizing them as the motive agents of progress, I should very confidently have concluded that it was neither proper nor becoming in me, as judge, to refuse to this testator the right to use them in this instance.

The testator's scheme was designed to be educational with respect to an important branch of legal and economic science, and in his opinion the circulation of the works of Mr. George would contribute to the accomplishment of that purpose. Therefore, viewing the subject from the standpoint suggested, I could not, in the line of judicial duty, have sanctioned a principle that, while it would repress the dissemination of the writings of Mr. George, would undoubtedly lend its aid to the circulation of the reply of the Duke of Argyle thereto, on the ground that the former are aggressive towards the legal establishment in question, while the monograph of the latter on that subject tends to quietism and public acquiescence. In such a situation, if I had possessed the power, I should not only have sanctioned, but have favored, the propagation of any or all of these works, in the conviction that such discussions advance the cause, not of error, but the cause of truth.

If, therefore, I were to accept the principle of judgment adopted by the vice-chancellor, I should have been obliged to dissent from his conclusion.

But, waiving such considerations, let us turn to the question, how far the principle of decision under criticism will stand the touch of judicial authority.

According to the theory indicated, and in some degree expounded, in the beginning of this opinion, it is attempted to be shown that, on such occasions as the present, the *index expurgatorius* to be applied by the court is formed on the principle that only such works are to be proscribed as manifestly tend to violations of law or to the corruption of morals or religion. To this catalogue the court below, as has appeared, added a class comprising such writings as a court, from its inherent nature, could not properly or becomingly aid in circulating.

It is evident that this extension of the rule will not harmonize with any of the adjudged cases. A reference to two of such authorities will be a sufficient illustration. Both of these decisions are cited in the briefs of counsel, and are referred to in the opinion of the vice-chancellor without hostile comment.

The first to which attention will be called is that of *Thornton v. Howe*, 31 Beav. 14. It was a case embracing a charitable use, and the words of the bequest were, "to propagate the sacred writings of Joanna Southcote." The argument took place before Sir John Romilly, who, upon looking into the works in question, found that their authoress was under the delusion that she was with child by the Holy Ghost; that she had conversations with the Devil, and intercommunings with the spiritual world. In view of these things, the master of the rolls said: "I have found much that, in my opinion, is very foolish, but nothing which is likely to make persons who read them either immoral or irreligious. I cannot, therefore, say that this devise of the testatrix is invalid by reason of the tendency of the writings of Joanna Southcote." And afterwards, his further declaration is: "But if the tendency were not immoral, and although this court might consider the opinions sought to be propagated foolish, or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms 'charitable bequests.'"

It needs no comment to show that this decision is irreconcilable with the rule upon which the present case has been decided. The master of the rolls, concluding that the tendency of the works was not immoral or irreligious, assented to their circulation, although he was satisfied that the doctrines taught by them were foolish, and without foundation.

The second authority to which I shall refer is that of *Jackson v. Phillips*, 14 Allen, 539. This controversy also related to a charitable use, the bequest being of a fund to trustees, "to be expended at their discretion in such sums, at such times, and such places as they may deem best for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment, will create a public sentiment that will put an end to negro slavery in this country." The decision of the court, in its own language, was (page 566): "The bequest itself manifests its immediate purpose to be to educate the whole people upon the sin of a man's holding his fellow-man in bondage; and its ultimate object to put an end to negro slavery in the United States,—in either aspect a lawful charity."

It is conspicuous that this decision is diametrically opposed to the rule under criticism. In the present case, the decision was that the court would not help in the circulation of books

that strove to show that private ownership in lands the validity of which had been repeatedly recognized by the courts had no better foundation than robbery. In the reported case, the court helped the dissemination of writings whose object was to prove that the ownership of human beings, which was a species of property established by the federal constitution itself, and sustained as such by repeated judgments both in the national and state courts, had no better foundation than sin.

The legal rule imposing limits on charitable uses is one of great importance; and, influenced by that consideration, I have examined with care the principle upon which the present case has been decided, and my conclusion is, that such principle does not consist with the authorities, and if it were adopted by this court would be productive of serious mischief. If sanctioned, the subject, with respect to the rights of donors in this field, would be involved in clouds and darkness; for instead of a rule we would have a speculation. By force of the prevalence of such a change, it may well be doubted whether it would not be altogether impracticable to disseminate, by means of a charitable use, the works of any of the leading political economists, either of the present or past age, for it is believed that none can be found that do not, in material particulars, make war, more or less aggressive, upon some parts of every legal system as it now subsists. Certain it is that neither the Political Economy of Mr. Mill, nor the Social Statics of Mr. Herbert Spencer, could be so circulated; for each of these very distinguished writers denies the lawfulness of private ownership in land. A principle bearing such fruits could not properly be introduced into our legal system, except upon the compulsion of irresistible authority.

It is obvious that by the application of the ordinary test, and which it has been thus insisted is and always has been the legal test, the works now in question do not come under the proscription of the law. It has been heretofore stated that they do not tend to the corruption of morals or religion, and it is equally evident that they are not opposed to any legal rule or ordinance. What these writings are calculated and were intended to effect is, to cause the repeal in a legitimate mode of the laws at present regulating the title to land, and the substitution of a different system. It would seem to be quite out of the question for this court to declare that such an endeavor is opposed to the law; for it is simply a proposition to alter the law according to the law.

The charitable use created in this will must be sustained, and the decree appealed from, to that end, must be reversed.

CHARITABLE USES. — As to what bequests are valid as charitable uses: *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736, and note 738-741; *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165; 39 Am. Rep. 741, and note 748-750. Instances of void bequests for charitable uses: Note to *Johnson v. Holfield*, 58 Id. 599-601. Charitable uses, and devises for that purpose, form the subject of note to *Owens v. Missionary Soc.*, 67 Am. Dec. 184, 185; see also *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226, and extended note 230-236. For a discussion of what constitute charitable uses, as defined by the American statutes, see extended note to *Dashiell v. Attorney-General*, 9 Am. Dec. 578-588; compare *Eutaw etc. Church v. Shively*, 67 Md. 493; 1 Am. St. Rep. 412, and cases cited in note. A devise to a church, "to be applied to foreign missions," is within the scope of the Kentucky statute permitting devises to charitable uses: *Kinney v. Kinney*, 86 Ky. 610.

DAYTON v. ADKISSON.

[45 NEW JERSEY EQUITY, 608.]

CONFLICT OF LAWS. — THE LEGITIMIZING OF A CHILD BY THE MARRIAGE OF ITS PARENTS subsequently to its birth in the state of their and its domicile has the effect of legitimizing it in another state, and conferring upon it the capacity to inherit realty in the latter state, as if it had been born in lawful wedlock.

BILL by Dayton in the nature of an interpleader to obtain direction of the court as to whom he should convey a trust estate. The property in controversy had belonged to Perry Adkisson, who died testate, leaving a will dated May 27, 1872, whereby he constituted James P. Dayton as his executor, and appointed him guardian of the testator's two children, John Wesley and Margaret, who are in the will described as "children begotten by me of one Eliza C. Price, widow." The executor of the will was given power to sell and convey the property whenever in his opinion it should be for the benefit of the testator's children so to do. The children spoken of in the will were twins. The boy, John Wesley, died in 1876, and the mother in February, 1887. She had been the widow of a soldier, and as such entitled to a pension during her widowhood. In the will the executor was directed when the children should arrive at age to convey to the daughter a frame house on Division Street, in the city of Camden, and to the son a brick house on Locust Street, in the same city. The son having died, the question was, whether the lot which was directed

to be given to him should be conveyed to his twin sister or not, the law of the state not permitting her to inherit under the circumstances, if illegitimate.

C. V. D. Joline, for the complainant.

John F. Harned, for Margaret Ann Adkisson, now, by marriage, Gibson.

H. A. Drake, for Miss Dill, and afterwards (by request of the court) for the attorney-general.

PITNEY, V. C. The question is, To whom shall the trustee convey the lot which by the will he was directed to convey to John Wesley Adkisson? The sister, Margaret Ann Adkisson (now, by marriage, Gibson), claims it on three grounds:—

1. She claims that the proofs show that her father and mother were married, and that she and her brother were born in wedlock; and she accounts for the language in her father's will by the fact that her mother was entitled to a pension during her widowhood, and desired the marriage to be concealed in order to enable her to continue to draw her pension.

2. She insists that, if the proof fails to show a marriage before the birth of the twins, it is yet ample to show one to have taken place at some period during the cohabitation, and that, as her father and mother were domiciled in Pennsylvania, and the twins were born there, such marriage, though it may have taken place subsequent to the birth of the children, was sufficient, under the statute of Pennsylvania of May 4, 1857 (Pamphlet Laws of 1857, p. 507; Brightley's Purdon's Digest, 1873, sec. 9, p. 1004), which provides that "in any and every case where the father and mother of an illegitimate child shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimated, and enjoy all the rights and privileges as if they had been born during the wedlock of their parents," to render the twins legitimate; and if legitimate in Pennsylvania, they are also legitimate in New Jersey, and competent to inherit from each other.

3. That as she is the twin sister of her deceased brother, she is his sister of the whole blood, and, as such, answers the description of the heir of a person dying without descendants, under the second section of our statute of descents.

The evidence, though somewhat conflicting, satisfies me that

a marriage ceremony actually took place at some time between the testator and the woman he names in his will as "one Eliza C. Price, widow." The only difficulty I have is, as to when it took place, whether before or after the birth of the children. But for the language of the will, I should have concluded that they were married at the time they went to live in the house in the court at the rear of No. 825 Carpenter Street, Philadelphia, where they lived when the twins were born, and continued to live until their respective deaths. The evidence is clear that they lived there together as a man and wife would do. The woman went by the name of Mrs. Adkisson. The testator directed a neighboring groceryman to give her credit as his wife during his absence on his periodical voyages to sea. He supported his family in the ordinary way, including two of her children by her former connections. He frequently expressed regret that he had married her, and one witness (Harmon) swears that he saw a marriage certificate framed and hung up in the room occupied by the parties. He says it was an ordinary printed blank marriage certificate filled up, and that it contained the names, in writing, of Perry Adkisson and Elizabeth Price, and was signed by one "Hardy [or Harding], minister of the Gospel," and that there was such a minister at the time in the neighborhood, who is since deceased.

Criticism was made on this man's evidence, on the ground that other witnesses who visited the house did not see the certificate, especially the sister and relatives of the woman Price, or Adkisson; but it did not appear that these last witnesses could read. They did appear to be illiterate. I observed the witness Harmon carefully while giving his testimony, and was impressed with his apparent truthfulness, and I feel constrained to give credit to his evidence in this respect.

The non-production of the certificate was accounted for by the circumstance that the surviving twin was only about seven years of age at the time of her mother's death, and the few household effects of the family were taken by an older half-sister, the issue of a previous connection of the mother, which half-sister has since died in an alms-house. Margaret herself was taken away from her mother's friends, brought over into New Jersey, and taken care of by Mr. Dayton, by being bound out to a farmer.

It does not appear to how late a date the mother continued to draw her pension; but Miss Dill swears she went to the pension-office after her sister's death, and drew the arrearages

of the pension—she did not say how much—due at her death.

Miss Dill and the other relatives of the mother lived in a part of the city distant from Carpenter Court, and did not often visit there. They testified that the mother was known in their circle as Mrs. Price, and that she denied her marriage to Adkisson, saying she would not marry and give up her pension. This evidence, however, was given when it was supposed that, if there was no marriage, Miss Dill would acquire the lot in question as the heir of her sister, under the act of 1877.

But I deem it unnecessary to determine the question of fact whether the marriage, which I am satisfied did take place, was prior or subsequent to the birth of the children, since it is clear, from the evidence, that the parties were domiciled in Pennsylvania, where the children were born, and continued to live in that state until they died, and that they were there married, and hence the children were rendered legitimate by the Pennsylvania act of 1857, and being legitimate there, are, in my opinion, legitimate in this state, and therefore the surviving sister, Margaret Ann Adkisson, is entitled to the lot in question as the heir of her deceased brother.

I do not deem it worth while to state, at any considerable length, the grounds upon which I reach this conclusion. They are stated elsewhere much better than I could state them.

The question involved was elaborately discussed in England in *Doe v. Vardill*, 5 Barn. & C. 438; *sub nom. Birtwhistle v. Vardill*, 2 Clark & F. 571; 7 Id. 895; in New York in *Miller v. Miller*, 91 N. Y. 315; 43 Am. Rep. 669; and in Massachusetts in *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321. In the latter case, Chief Justice Gray cites and comments upon every case up to that date (1880), and after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding, in *Doe v. Vardill*, *supra*, that an heir to land in England must be actually born in wedlock, do not apply in this country, and that a person declared to be a legitimate child of another, by the law of the state of the domicile, must be held to have all the rights of a legitimate child wherever he goes. The court of appeals of New York, in 1883, in the case above cited, came to the same conclusion in a case where a son born out of wedlock in Germany was legitimized by the subsequent marriage and cohabitation of his parents in Pennsylvania, by

force of the same statute above quoted, and held such son entitled to inherit lands in New York.

The result in these cases has the support of Judge Story, in his *Conflict of Laws*, sections 93 et seq.; of Dr. Wharton, in his work on the same subject, sections 240 et seq.; and of Professor Parsons, in 2 *Parsons on Contracts*, 5th ed., 600.

An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the statute, so called, of Merton, 20 Hen. III., c. 9, which, it was claimed, negatively enacted that the English heir must be born in lawful wedlock. Lord Brougham, in 2 Clark & F. 582, and again in 7 Id. 914, combats this position with arguments that the courts of New York and Massachusetts seemed to think unanswerable, and they appear so to me.

And see the strictures upon the result of the English decision in the judgment of Lord Justice James in *Goodman's Trusts*, L. R. 17 Ch. Div. 266, 296-298.

The English judges in *Doe v. Vardill*, *supra*, did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous-born issue, and that being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, that a person who inherits land in England must not only be legitimate, but must have been actually born in wedlock: *Ross v. Ross*, 129 Mass. 252-254; 37 Am. Rep. 321; *Miller v. Miller*, 91 N. Y. 321, 322; 43 Am. Rep. 669.

It is worthy of remark that the famous statute of Merton, 20 Hen. III., c. 9, is, in fact, not a statute, but a mere entry on the minutes of Parliament of a refusal by the English lords to assimilate the laws of England to that of other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate.

An equivalent of this statute of Merton was enacted in Pennsylvania: Purdon's Digest, 9th ed., 565; P. L. 1833, p. 318 (see the report of the judges, 3 Binn. 565-600); and while in force produced the decision in *Smith v. Derr*, 34 Pa. St. 126; 75 Am. Dec. 641.

I am unable to find among our statutes any enactment equivalent to the statute, so called, of Merton, and I think that public policy at this date favors the adoption of the rule which I have concluded to apply in this case, and that that rule is supported by the weight of authority in this country. Statutes similar to that in Pennsylvania exist in many, if not

most, of our sister states, and also statutes which provide, as our own does, for the adoption of children by legal proceedings. Many persons come to reside among us from neighboring states, and from those countries of Europe governed by the civil-law system, and bring with them children whom they suppose to be their lawful heirs for all purposes, but who would be denied the right of heirs as to real estate by the rule adopted in England in *Doe v. Vardill*, *supra*, while, as to personal property, they would be lawful next of kin. I do not think such a state of the law a desirable one, and am not willing to be the first judge to declare such to be the law in this state. Nor do I think a law enabling, or even encouraging, parents to do simple justice to their innocent offspring, begotten out of wedlock, by investing them with the complete attributes of heirs, is immoral or tends to promote immorality. I see no reason why a man should not be permitted to adopt and invest with rights of heirship his own illegitimate child by marrying its mother; and I see no difference in morals between such mode of adoption and that provided by our statutes, which enables a man to adopt, with that effect, even the illegitimate child of unknown parents.

I shall advise that a decree be made directing the complainant to convey the tract of land in question to Margaret Ann Gibson, and that there be a reference to a master to take and state the accounts of the income of the lands. Costs of all parties will be paid by the complainant out of the funds in his hands, if there be sufficient for that purpose, otherwise they will be a charge upon the land to be conveyed.

CONFLICT OF LAWS. — An illegitimate child made legitimate by the laws of the state in which his parents are domiciled is forever after legitimate everywhere: *Miller v. Miller*, 91 N. Y. 315; 43 Am. Rep. 669; but a child born out of wedlock, and made legitimate under the laws of another state, is not thereby clothed with inheritable capacity in Pennsylvania, where birth in lawful wedlock alone gives one the capacity to inherit: *Smith v. Derr*, 34 Pa. St. 126; 75 Am. Dec. 641, and note; but a child who has been legally adopted in another state, whereby he becomes entitled to inherit property, may also inherit property in Massachusetts, where similar adoption laws exist: *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321, and note.

SITES v. ELDREDGE.

[45 NEW JERSEY EQUITY, 682.]

POWER OF SALE IN A WILL, TERMINATION OF. — If a devise is made to one who is also appointed sole executor, and authorized as such to sell and convey property at any time he may deem expedient, without designating any object for which the power should be exercised, the power terminates with the life of such devisee and executor.

INFANT CHILDREN ARE AS MUCH BOUND BY PARTITION PROCEEDINGS as adults, if they are regularly brought into court, and guardians appointed for them.

REAL ESTATE WHEN INCLUDED IN A DEVISE. — A clause in a will stating that the testator gives and bequeaths to his wife "all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances, and other property of like nature now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of S. & H.," vests in the wife all the real estate of the testator. The word "real," as used in this clause, is not cut down or limited by the context so as to make it include only the chattels nominated.

William R. Barricklo, for the complainant.

Willard C. Fisk, for the defendant.

PITNEY, V. C. The defense in this cause is rested wholly upon an alleged defect, or rather two defects, in the complainant's chain of title. The chain of title submitted reaches back to one William Jewett, the elder, who died in 1874, and who, by his will, devised the lands in question to his son, William S. L. Jewett, in fee-simple, and also gave to his executor a general power of sale, and appointed his son sole executor. He gave his wife the use of a house and grounds, other than those in question, and also an annuity of five hundred dollars a year. He also directed his son to make a further provision for her comfortable support, over and above the annuity, in these words: "It is, however, my will and desire that my said wife may be comfortably provided for, and that my said son shall do all that natural love and affection should dictate, or that she should reasonably require."

The annuity was declared to be not a charge on any of the lands, except the house and grounds above mentioned. The widow and son are both dead. The son died in 1876, intestate, and without having exercised the power of sale, leaving three daughters and a widow. In 1883, the elder of these three daughters, having attained her majority, instituted proceedings in this court for a partition of the lands in question, making her sisters, who were still infants, and her mother, parties to her bill. Under those proceedings, the land was sold, and the

proceeds divided between the three children and widow, the latter accepting a sum in gross.

The first objection to the title is, that this power of sale is still outstanding, and may yet be executed at the instance and for the benefit of the children who were infants when the decree for sale in partition was made.

I do not think this objection has any strength whatever. The gift of the power to the executor is, in this case, a mere addition to a devise in fee to the son. At one time it was successfully contended that such a power was idle and nugatory, and therefore void: *Goodill v. Brigham*, 1 Bos. & P. 192; *Maundrell v. Maundrell*, 7 Ves. 567, 583, where Sir William Grant held that a widow could not be barred of her dower by the exercise of such a power appurtenant to a fee. The power in such cases was held to be merged in the fee: 1 Sugden on Powers, 105 et seq. This decision of Sir William Grant was reversed, on appeal, by Lord Eldon (10 Ves. 246, 256), on the ground that the creation of such a power of sale appurtenant to a fee was in common use by the great English conveyancers as a legitimate means of enabling the grantee to bar his wife's dower, and also of enabling a *feme covert* to convey by simpler and less expensive machinery than was required to pass a fee in the ordinary way.

In the case in hand, the only beneficial use which could be made of the power was, to enable the son to convey, free of his own debts and of his wife's inchoate dower, in order to provide for his mother in accordance with the express direction and wish of the testator. No other person but his mother could derive any direct benefit from its exercise. It also enabled the son to convert real estate into personalty, and transmit it in that shape to his children, free of dower on the part of his wife.

From this view, it follows that the power was one inherently of a nature not to be exercised by any one but the grantee, and therefore not transmissible or to be exercised by an administrator *de bonis non* or other representative in succession.

The case does not fall within the terms of the statute authorizing sales by representatives in succession, but is clearly within the line of cases holding such representatives incapable of conveying: *Chambers v. Tulane*, 9 N. J. Eq. 146; *Naundorf v. Schumann*, 41 Id. 14.

The language of the will in this case is as follows: "I authorize my executor to sell and convey at any time he may

deem proper and expedient." This language is too plain for argument.

It was left wholly discretionary with the son whether he would or would not cut off his wife's dower, or whether he would use the power to raise money for his mother.

But further, upon the facts as stated, and independent of the language importing special trust and confidence in the son, it seems to me the power ought to be decreed to have expired and to be lost by lapse of time and want of any object to keep it alive. It would be dangerous to give countenance to the idea that, in a case like this, an old power could be hunted up, revived, and put in force in order to divest titles derived from the heirs of the devisee in fee-simple: *Moore v. Moore*, 41 N. J. L. 440; and see *In re Cotton's Trusts*, L. R. 19 Ch. Div. 624, where many cases are collected.

I should have thought it unnecessary to cite cases on this point were it not for one case in our reports, viz., *Scudder v. Stout*, 10 N. J. Eq. 377, where Chancellor Williamson upheld a conveyance made by trustees seventeen years after the power had accrued, on the ground that, although the trustees acted in bad faith, and their conduct was fraudulent, yet the purchasers from them acted in good faith, and without notice of the bad faith of their grantors; and he gave the complainant in that suit relief against the trustees who made the sale, and against the *cestuis que trustent* who received the proceeds of the sale. But it is plain that the learned chancellor was strongly influenced by the circumstance that the grantees had paid their money in good faith, and had been in possession under their title for fifteen years before any suit was brought to disturb them, and that the sale was promoted by the father of the complainant.

But further: here it seems to me that the two infant children are as much bound by the partition proceedings as if they had been adults. They were regularly brought into court and guardians appointed for them. The title was adjudged to be in them as tenants in common with their adult sister, and a proper share of the proceeds of the sale paid to the guardian of each, and they have each, since their majority, accepted from the guardian the sum so awarded. No court, under the circumstances, would appoint new trustees to execute the power of sale, and this court would not permit the two children, who were infants when the partition was made, to take any benefit from a sale of the same premises by a new repre-

sentative of their grandfather under this power. The complainant in the partition suit is equally estopped, for she conveyed to the devisee of the complainant. There are no other persons who can possibly derive any benefit from the exercise of the power.

The next objection taken to the title arises under the will of William W. Sites, the husband of complainant, who acquired title to the premises in question by conveyance from Mary W. Jewett, who purchased at the sale under the partition proceedings.

The clause in the will of said Sites, which is the basis of the objection, is as follows: "I give and bequeath to my wife, Jeannie M. Eldredge [the complainant], all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances, and other property of like nature now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of Sites and Harrison."

The defendant argues that the ordinary force of the word "real" in this clause is cut down and limited by the context so as to make it include only the particular chattels enumerated; and further, that those chattels are in their nature chattels real; and he relies upon the line of cases collected and cited by Mr. Jarman in his treatise on wills, page 716 (Randolph and Talcott's ed., vol. 2, pp. 315 et seq.).

An examination of those cases will show that in most of them the contest was over the force of the word "estate," without any preface of "real" or "personal," the question being whether, considering its "society," it was intended to include lands held in fee-simple or not. In England, a large portion of the lands have always been held under long leases, and chattels real were a frequent subject of testamentary disposition. I find the question arose there in one case whether the word "real" should not be confined to chattels real. The case is *Marhant v. Twisden*, Gilb. Eq. 30, decided in 1712, and cited by Mr. Jarman (page 717). A testator, after bequeathing several pecuniary legacies, proceeded thus: "All the rest and residue of my estate and chattels, real and personal, I give and devise to my wife," etc.; and it was held that the word "real" must be confined to chattels real. Mr. Jarman says of that case, that "no case had gone so far in restraining the word 'estate.' Nothing was more obvious than to consider the word 'real' as applying to 'estate,' and 'personal' to 'chattels,'

corresponding as they respectively do in local order; and such it is confidently apprehended would be the construction at this day." That Mr. Jarman's criticism is correct, abundantly appears by a consideration of the later cases cited by that learned author.

But I do not think that *Marhant v. Twisden*, *supra*, even if still an authority, can have any bearing on the case in hand, for I do not find any chattels real among those enumerated in Sites's will.

Another case liable, momentarily, to be supposed to resemble that in hand is *Timewell v. Perkins*, 2 Atk. 102, decided in 1740 by Mr. Justice Fortescue, sitting at the rolls. The question arose on the will of John Hitchins, in these words: "All those my freehold lands and hop-grounds with the messuages or tenements, barns, etc., now in the tenure and occupation of the widow Leach, and all other the rest and residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, etc., or in any other thing whatsoever or wheresoever, I give unto my dearly beloved Arabella Hitchins and her assigns forever."

And the question was, whether the residue of the real estate passed to Arabella under this disposition, and it was held that it did not, the judge remarking: "The word 'estate' itself, indeed, may include as well real as personal; yet when the testator has expressed himself by such words as are applicable to personal only, I cannot intend he meant the real estate."

In addition to this reason, founded on the words following and qualifying the word "estate" in that case, there is the further consideration, not alluded to by the judge, that the testator preceded the gift of the residue by a specific devise of certain described lands to the same beneficiary, and no reason was apparent why he should pick out and devise specifically one particular parcel of freehold to the devisee, and then proceed in the same sentence to devise all the residue of the realty to the same person by general words. The maxim, *Inclusio unius exclusio alterius*, seems to me to apply. But I think it apparent, from the numerous later decisions cited further on by Mr. Jarman, that the English courts at this day would hold that the residue of the realty would have passed in that case, under the very strong words found in the latter part of the devise.

It is enough, for present purposes, to say that the case does not reach the one in hand.

I have carefully examined all the cases cited, and find among them no authority for restricting the force of the word "real" in Sites's will. In fact, except as to certain set phrases so long in use by the English conveyancers as to have acquired a technical meaning, precedents are of little value in interpreting wills. The modern tendency is to confine the attention to the meaning of the words as found in the will. In reading this will, I have not the least doubt that, by the words here used, the testator meant to give his wife all his real estate. Such is the natural meaning of the language, "I give and devise to my wife, Jeannie M. Eldredge, all my real and personal estate." And the words "consisting of," etc., which follow, are naturally confined to the words "personal estate," and were intended simply to specify what that personal estate consisted of. At a venture, I should suspect that the enumeration was made as information to his executor, that he claimed to own such property in severalty, as distinguished from other property which belonged to the firm, of which he appears to have been a member.

I will advise a decree for the complainant.

PARTITION. — Infants are bound by decrees in partition: Freeman on Co-tenancy, secs. 457, 467. As to decrees and judgments against infants: Note to *Joyce v. McCoy*, 89 Am. Dec. 184-193.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HARDING v. LONG.

[103 NORTH CAROLINA, 1.]

FRAUD AND MISTAKE — EVIDENCE TO REFORM DEEDS, WHAT REQUISITE.

— In order to correct a deed, whether on the ground of mutual mistake of one of the parties, and fraud on the part of the other, or that it was drawn by mistake as an absolute deed, when it was intended to be a mortgage or trust deed, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a lost deed, such allegations of the party seeking relief as are necessary to show his right to it must be established by clear and convincing proof, and evidence *dehors* the deed, and inconsistent with it, must be shown in order to set up a parcel trust, or to reform the deed.

FRAUD AND UNDUE INFLUENCE — EVIDENCE TO PROVE. — In order to have a deed declared void because executed through false and fraudulent representations or undue influence, or because executed with intent to hinder and delay creditors, the allegations material to establish the fraud must be proved so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, but their truth need not be established, to the satisfaction of the jury, "beyond all reasonable question."

PROCEEDING by Mary E. Harding to have dower allotted to her. She had executed a deed to her unassigned dower in her deceased husband's land, to her brothers-in-law, for a consideration of \$275. When plaintiffs demanded that the dower be assigned to them, she answered that they had taken advantage of her distress consequent upon her husband's death, and, having her confidence, had made false representations as to the condition of the estate, especially the probable value of her dower, and had thereby induced her to execute the deed. The following issue was submitted to the jury, and the finding

thereon was in favor of plaintiffs: "Was the deed described in the petition of plaintiffs obtained from the defendant Mary E. Harding through fraud or undue influence?" Judgment for plaintiffs; defendants appealed.

J. B. Batchelor, for the plaintiffs.

A. E. Holton and W. B. Glenn, for the defendants.

AVERY, J. We think that the judge who tried the case erred in instructing the jury as to the measure of testimony required to establish the allegation, that the execution of the deed had been procured by fraud or undue influence.

Defendant asked the court to instruct the jury "that if the price paid by the plaintiffs was so inadequate as to amount to apparent fraud, or the situation of the parties so unequal as to give the plaintiffs the opportunity of making their own terms, that the burden rests on the plaintiffs to show that the transaction was fair, and that there was no fraud or undue influence."

The court charged the jury as follows: "The defendant Mary E. Harding claims that the deed executed was obtained from her by the fraudulent misrepresentations of the plaintiffs, and that advantage was taken of her situation and distress consequent upon the recent death of her husband. The plaintiffs claim that she acted voluntarily, with a full knowledge of her rights and what she was doing; that no fraudulent misrepresentations were made, or fraudulent and controlling influence was exercised, to induce her to make the deed. Mere inadequacy of price alone is no ground for setting aside the deed executed by Mary E. Harding. Fraud or undue influence must be proved, and the burden is upon the defendant Mary E. Harding, who seeks to set aside the deed, to satisfy the jury by clear, strong, and convincing proof, that fraudulent misrepresentations were made, or a fraudulent and controlling influence was exercised, to induce her to make the deed which she would not otherwise have made. Unless the jury are so satisfied, beyond all reasonable question, they must answer the issue, 'No.' If it does so satisfy them, they will answer, 'Yes.' If the jury find that she acted voluntarily, with a full knowledge of her rights and what she was doing, they will answer the issue, 'No.' "

The jury, after consideration, answered the issue, "No."

In order to give proper effect to the words "so satisfied," we must consider the instruction as if the language used had

been the following: "Unless the jury are satisfied, beyond all reasonable question, that the fraudulent representations were made, or a fraudulent and controlling influence was exercised, to induce her to make the deed which she would not otherwise have made, they must answer the issue, 'No.'"

In *Lea v. Pearce*, 68 N. C. 77, it was held by this court to be error to instruct a jury that fraud must be proven beyond a reasonable doubt in order to justify a verdict finding fraud. In the opinion, Chief Justice Pearson, for the court, says: "It is very questionable whether this formula, which has been acted upon in the trial of capital cases, has answered any useful purpose; but it has never been extended to civil actions. The rule is, if the evidence creates in the minds of the jury a belief that the allegation is true, they should so find."

The facts in that case were, that the plaintiffs alleged that one of the defendants, taking advantage of the friendly and confidential relations subsisting between him and the relator under whom the plaintiffs claimed, fraudulently induced her to sign a deed conveying her land to the other defendant, his wife.

Here the *feme* defendant's brothers-in-law are charged with having abused her confidence, and induced her to convey her dower interest. There is no sufficient allegation in either case that the relations were such as to raise a presumption in law of fraud, so as to shift the burden, and require the party charged with the fraud to rebut it by satisfactory evidence.

The issue in that cause, as in this, was, under the former practice, cognizable only in a court of equity. We are unable to draw any distinction between "proving beyond reasonable doubt" and "beyond reasonable question," unless we treat the latter expression as the stronger of the two. One of our leading lexicographers defines question to mean (in such connections as that in which it appears in the charge of the judge) "doubt"; another, "dispute"; so if the former definition be adopted, the words are synonymous; if the latter be correct, it may be that there is still room for dispute when the doubt that lingers in the mind is no longer within the domain of sound reason.

The rule that the evidence must be sufficient to produce belief in the minds of the jury that the allegation of fraud is true, in order to invalidate and set aside a deed, is equivalent to saying that the fraud alleged must be proven to the satisfaction of the jury, or so as to satisfy the minds of the jury

of their truth; and this has been declared by this court to be very different in its import from proving a fact beyond a reasonable doubt: *State v. Ellick*, 2 Winst. 36; 86 Am. Dec. 442; *State v. Vann*, 82 N. C. 631. In *State v. Vann*, *supra*, Justice Dillard, for the court, says, in reference to testimony offered in behalf of a prisoner: "And in making such extenuating or acquitting proofs, the law put on him the *onus* to do so, not excluding all reasonable doubts, but merely to the extent of satisfying the jury." On the other hand, in *State v. Payne*, 86 N. C. 609, Justice Ashe, delivering the opinion, after calling attention to the fact that in *State v. Ellick*, *supra*, the erroneous principle stated in *State v. Johnson* had been overruled, and a defendant was no longer required to establish mitigating or justifying circumstances beyond a reasonable doubt, says further: "In it [referring to *State v. Ellick*, *supra*] is corrected what we consider as erroneous in the decision of *Commonwealth v. York*, that matters of excuse or extenuation, which the prisoner is to prove, must be decided according to the preponderance of evidence. It is never correct to say, as we think, that they must be proved to the satisfaction of the jury."

The exact language used by the court in *Lea v. Pearce*, *supra*, was adopted in the instruction given by the court below in *McLeod v. Bullard*, 84 N. C. 515, and being excepted to, was approved by this court in overruling the exception. Counsel for the plaintiffs insisted that the rule laid down for this court by Justice Merrimon in *Ely v. Early*, 94 Id. 1, as applicable where actions are brought to correct deeds, must govern this case.

The language used in *Ely v. Early*, *supra*, and made the basis of instruction in this case, to which it was never intended to apply, was as follows: "That the court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only when the mistake is made to appear by clear, strong, and convincing proof," etc.

Speaking of the deed, the court say further: "In such cases, the court will not disturb the deed or other writing, and upon the strong ground that the parties have agreed to make the writing evidence between them as to the matters contained in it. It must stand until, by a weight of proof greater than itself, a court of equity, in the exercise of a very high and deli-

cate jurisdiction, shall correct it." That action was brought by the plaintiff in part to correct a deed, made by mutual mistake of the grantor and grantee, as alleged; and it will be observed that the court, in express terms, lay down a rule applicable only where parties ask the equitable relief of correcting a deed. There was no reason why the distinction should have been then drawn between the degree of proof necessary in cases of that kind and other causes involving an issue of fraud.

In *Loftin v. Loftin*, 96 N. C. 94, it was held that the evidence of the existence and loss of a deed, offered with a view of setting it up, must be clear and convincing. *Deans v. Dortch*, 5 Ired. Eq. 331, *Fisher v. Carroll*, 6 Id. 485, and *Plummer v. Baskerville*, 1 Id. 252, were cited to sustain the view of the court.

In *Hemphill v. Hemphill*, 99 N. C. 436, this court held that a deed absolute upon its face cannot be corrected so as to convert it into a trust upon a mere preponderance of evidence, or without some facts *dehors* the deed inconsistent with the idea of absolute ownership, but only upon such full proof as, in the old court of equity, would satisfy a judge.

This view is sustained by a long line of cases in our own court: *Briggs v. Morris*, 1 Jones Eq. 194; *Taylor v. Taylor*, 1 Id. 246; *Kemp v. Earp*, 7 Ired. Eq. 167; *Moore v. Ivey*, 8 Id. 192.

The principle announced in *Ely v. Early*, 94 N. C. 1, is fully sustained both by our own decisions and other authorities: *Harrison v. Howard*, 1 Ired. Eq. 407; *Brady v. Parker*, 4 Id. 430; *Newsom v. Bufferlow*, 1 Dev. Eq. 379; *Clemmons v. Drew*, 2 Jones Eq. 314; *Wilson v. Western N. C. Land Co.*, 77 N. C. 445; *Burger v. Denk*, 100 Pa. St. 113; Story's Eq. Jur., secs. 153-158; Pomeroy's Eq. Jur., secs. 858, 859.

We search in vain among our own decisions, and counsel have referred to none, where proof so full and clear has been required in order to establish the allegation that the execution of a deed was procured by false and fraudulent representations, in order to hinder, delay, or defeat creditors; and the case of *Lea v. Pearce*, *supra*, which has been so often cited upon another point, is express authority to show that proof satisfactory to a jury is sufficient in such cases. We cannot agree that the line should be drawn so as to require convincing proof in all cases heretofore exclusively cognizable in a court of equity. The weight of authority is against that view.

Bigelow, in his work on fraud (c. 17, p. 474, sec. 3), declares

the rule to be as follows: "It is not necessary for the evidence to show, beyond a reasonable doubt, that a party is guilty of fraud. It is settled law that, upon a trial of a civil action in which the claim or defense is based on alleged fraud, the issue may be determined on the preponderance or weight of evidence, except in cases of resulting trusts arising on verbal agreements to buy for another. In other cases of fraud, nothing more is required than that the evidence should be sufficient to satisfy the conscience of a common man, although the evidence does not amount to absolute certainty. Evidence of fraud is not required to be more direct and positive than that of facts and circumstances leading to the conclusion that it was committed. Hence an instruction to the jury that the fraud in question could not be proved by them except upon clear and undoubted proof of it is erroneous."

The view of that author, that fraud may be proven by a mere preponderance of evidence, is supported by eminent text-writers and other authority: *Wait on Fraudulent Conveyances*, 281; *Painter v. Drum*, 40 Pa. St. 467; *Rea v. Missouri*, 17 Wall. 532; *Clarke v. White*, 12 Pet. 224.

We conclude, therefore, that the true rule, as far as our own adjudications have settled the question, is, that in order to get the aid of a court to correct a deed, whether on the ground of mutual mistake of one of the parties and fraud on the part of the other, that it was drawn, by mistake, an absolute deed, when it was intended to be a mortgage or deed of trust, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a lost deed, such allegations of the party seeking the relief as are necessary to show his right to it must be established by clear and convincing proof, and evidence *dehors* the deed, and inconsistent with it, must be shown in order to set up a parol trust, or have any deed reformed: *Williams v. Hodges*, 95 N. C. 82; *Smiley v. Pearce*, 98 Id. 185; *Shield v. Whitaker*, 82 Id. 516.

But, on the other hand, when the relief demanded by a party is, that a deed shall be declared void because its execution was procured by false and fraudulent representations or undue influence, or that it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud must be proven, so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury.

It may be that other cases will arise hereafter that will fall

on the one side or the other of the line. This view of the case is perfectly consistent with all of the decisions of this court.

Bump, in his work on fraudulent conveyances, pages 562 and 563, says what is equivalent to the rule laid down by Chief Justice Pearson: "If the evidence is admissible, as conducing in any way to the proof of the fact, the only legal test applicable to it, upon such issue, is its sufficiency to satisfy the mind and conscience, and produce a satisfactory conviction or belief. What amount of weight of evidence is sufficient proof of a fraudulent intent is not a matter of legal definition." It seems that the author expresses his view of the measure of testimony necessary to warrant a verdict on issues of fraud in language almost identical, and in words certainly equivalent in meaning to the rule laid down by Chief Justice Pearson in *Lea v. Pearce, supra*. The author says, subsequently, what still more strongly sustains our view: "It is not necessary, however, that the fraud shall be proved beyond a reasonable doubt."

In Kerr on Fraud and Mistake, page 382, we find that the author's view of the amount of evidence necessary to establish fraud is also expressed in language of the same import as that used in *Lea v. Pearce, supra*: "Fraud will not be carried one tithe beyond the manner in which it is proved to the satisfaction of the court." On page 384, the same author says: "It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established." In a note to the foregoing paragraph, Bump says (page 385, note): "This means no more than that the proof must be such as to *create belief*, and not merely suspicion. A rational belief should not be discarded because it is not conclusively established."

The distinction that we have drawn in working out the line dividing the causes of action that cannot be established without clear and convincing evidence, and, in some cases, proof *dehors* a deed, and inconsistent with it in its original shape, and the ordinary issues of fraud falling under the general rule, that it is sufficient to prove fraud to the satisfaction of the jury, is sustained by sound reason as well as high

authority. One who comes into a court of conscience, declaring that he is in truth a party to deed, that is the highest and most solemn evidence of his contract, and asks that, while the contract is allowed in part to stand, some of the provisions or stipulations shall be altered by striking out portions of the deed, and inserting in lieu contradictory expressions, and asking a court of equity, in effect, to assist him in avoiding a statute enacted to prevent frauds, because its rigid enforcement and a strict adherence to the law of estoppels may work a remediless wrong, without such relief, occupies a different position from one who disowns *in toto*, for himself or those under whom he claims, a deed apparently executed, upon the ground that its execution was procured by fraud or undue influence, or from one who asks to set aside the deed of another, as in fraud of the rights of creditors or subsequent purchasers for value. The former should be held to stricter and stronger proof to establish his right to the relief asked.

So, too, one who invokes the aid of a court to set up by parol evidence, and in the face of the denials of those interested adversely, a solemn deed, the stipulations of which are sometimes void, unless in writing, on the ground that it has been once executed, but has been lost or destroyed, is properly required to produce the clearest evidence of loss; because, if the rule were otherwise, a premium would be offered for perjury, and the rights of honest men would be imperiled by the groundless claims of those who are mercenary and dishonest.

While we have drawn the line of distinction between the two classes of actions, of which *Lea v. Pearce, supra*, is selected as the representative head, on the one hand, and *Ely v. Early*, 94 N. C. 1, on the other, it is not improper to emphasize and support, by more explicit citation of authority, the statement already made that, as applicable to allegations of mistake requiring as the appropriate remedy the reformation of a deed, the language used in the latter cause, and adopted by the judge below in his charge, is not stronger than is warranted by older decisions of our own court, and sanctioned by such writers as Story and Pomeroy. We find an intimation by Taylor, J., in *Newsom v. Bufferlow*, 1 Dev. Eq. 379, that the allegation in such cases must be proven "beyond rational doubt."

The authorities already cited show repeated recognitions of the rule that the proof must be clear and convincing.

Judge Story (in his work on equity jurisprudence, section 153), referring to causes in which one asks the court to correct a deed on the ground of mistake, says: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt. The distinction here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases, or that distinction which is expressed by a fair preponderance of evidence and full proof."

Pomeroy states the rule, in reference to proof in correcting mistakes, quite as broadly: "Courts of equity do not grant the high remedy of reformation upon a probability, or even upon a mere preponderance, but only upon a certainty of error": Pomeroy's Eq. Jur., sec. 859.

We have not deemed it necessary to discuss the other exceptions, as that to the charge is decisive of the right to new trial.

For the error complained of in his honor's charge, a new trial will be awarded.

EVIDENCE AS TO FRAUD AND MISTAKE. — In cases of fraud or mistake, parol testimony can be received to convert a deed absolute upon its face into a deed of trust: *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471, and note; *Sturtevant v. Sturtevant*, 20 N. Y. 39; 75 Am. Dec. 371, and note; but in order to reform a deed for fraud, the evidence must be clear and convincing: *Monks v. McGrady*, 71 Tex. 134; *Raymond v. Cox*, 44 N. J. Eq. 415; *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and note; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816, and note; *Cross v. Bean*, 81 Me. 525; *Hollenbeck's Appeal*, 121 Pa. St. 322.

FRAUD CAN BE ESTABLISHED by a preponderance of evidence: *McCreary v. Skinner*, 75 Iowa, 411; for proof of fraud need not be made beyond a reasonable doubt: *Wylie v. Posey*, 71 Tex. 34; yet circumstances of mere suspicion are insufficient to establish fraud: *Fraser v. Passage*, 63 Mich. 551.

BOONE v. LEWIS.

[103 NORTH CAROLINA, 40.]

WILLS. — **SUBSCRIBING WITNESS** to a will, if in all respects eligible, assumes a serious duty and a legal relation thereto necessary to its validity, if there are but two subscribing witnesses, and important, however many there may be. This duty he cannot cast off for any cause at his pleasure without the consent of the maker of the will, given in his lifetime. Having subscribed as such witness, the law holds him to the legal consequences of such relation.

WILLS. — **SUBSCRIBING WITNESS**, TO BE HELD LIABLE to the legal consequences following such relation, must have consented to sign as such, and must

authority. One who comes into a court of equity, claiming that he is in truth a party to a deed, the most solemn evidence of his contract being the deed itself, and the contract is allowed in part to stand, and the other parts are altered, or the deed is inserted in its original form, and asking a court of equity, to enforce a statute enacted to prevent fraud, and a strict adherence to the letter of the law, would work a remediless wrong, and place the party in a different position from one in which he was when he signed the deed, those under whom he claims, upon the ground that he was under undue influence, or the undue influence of another, as in the case of purchasers for value, and stronger proof is required.

So, too, one who claims to be a subscribing witness, and whose name appears thereon at or near the signature, may nevertheless prove that he did not consent, to witness the will under which he claims, and that he only witnessed the signature of a witness to the will, and that he himself and his signature by his cross-mark, supposed to be his, required a witness.

erly re, witness: W. H. JONES.

if th^{his} DAVID X LEWIS.

peri^{mark} JAMES B. LEWIS."

th^{the} other facts appear from the opinion. Judgment for plaintiffs. Defendant appeals.

W. H. Day and T. N. Hill, for the plaintiffs.

R. O. Burton, for the defendant.

MERRIMON, J. The statute (Code, sec. 2147) provides that "if any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate, shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted to prove the execution of such will, or the validity or invalidity thereof."

The obvious purpose of this provision is to prevent incentive

to perjury and ineligibility and incompetency of witnesses of wills, by reason of interest, who consented and undertook to be such at the time the will was executed. Such a witness in all respects eligible assumes a serious duty and a legal relation to the will, necessary to its validity, if there be but two witnesses to it, and an important one, however many there may be, that he cannot cast off and rid himself of, for any cause, at his will and pleasure; certainly not, unless he shall do so with the consent of the maker of the will in his lifetime. The statute (Code, sec. 2136) prescribes that all wills to be proven by attesting witnesses shall be "subscribed in his (the maker's) presence by two witnesses at least," etc. Thus it is made essential to have such witnesses,—they consent to be, and subscribe the will in the presence of the maker for all proper legal purposes in that connection. They thus become identified with the will, and the law justly holds them to such relation, and the legal consequences of it. Otherwise, a witness might defeat it, after he had consented to witness, and had witnessed, its execution.

But such relation with the will must, indeed, exist,—the witness must have consented to be, and must have subscribed to the will as, a witness thereof in the presence of the maker of it. Otherwise, the subscriber is no such witness. It is not sufficient that the subscriber carelessly, or for some other purpose, wrote his name at or about the place where such witnesses usually subscribe their names, although, if he should do so, there might arise a presumption of fact, nothing to the contrary appearing, that he intended to become a witness.

There is neither principle nor statutory provision that, necessarily, makes a person a witness to a will merely because he subscribed his name in the place where such witnesses usually subscribe their names; nor that prevents the person whose name is so subscribed, or any person interested, from explaining how and why the subscription came to be made, and that in fact the person so subscribing was not a witness, as he purported by the writing to be. The subscription, in such connection, would be evidence—strong evidence—that the person subscribing intended to be a witness, but the contrary might be shown. And so, also, where the subscriber, in such connection, denied that he was such witness, it might be shown that he subscribed as such. And so, also, if the subscribing witnesses were dead, while the strong presumption would be that they were such, especially if there were a formal attesta-

to perjury and ineligibility and incompetency of witnesses of wills, by reason of interest, who consented and undertook to be such at the time the will was executed. Such a witness in all respects eligible assumes a serious duty and a legal relation to the will, necessary to its validity, if there be but two witnesses to it, and an important one, however many there may be, that he cannot cast off and rid himself of, for any cause, at his will and pleasure; certainly not, unless he shall do so with the consent of the maker of the will in his lifetime. The statute (Code, sec. 2136) prescribes that all wills to be proven by attesting witnesses shall be "subscribed in his (the maker's) presence by two witnesses at least," etc. Thus it is made essential to have such witnesses,—they consent to be, and subscribe the will in the presence of the maker for all proper legal purposes in that connection. They thus become identified with the will, and the law justly holds them to such relation, and the legal consequences of it. Otherwise, a witness might defeat it, after he had consented to witness, and had witnessed, its execution.

But such relation with the will must, indeed, exist,—the witness must have consented to be, and must have subscribed to the will as, a witness thereof in the presence of the maker of it. Otherwise, the subscriber is no such witness. It is not sufficient that the subscriber carelessly, or for some other purpose, wrote his name at or about the place where such witnesses usually subscribe their names, although, if he should do so, there might arise a presumption of fact, nothing to the contrary appearing, that he intended to become a witness.

There is neither principle nor statutory provision that, necessarily, makes a person a witness to a will merely because he subscribed his name in the place where such witnesses usually subscribe their names; nor that prevents the person whose name is so subscribed, or any person interested, from explaining how and why the subscription came to be made, and that in fact the person so subscribing was not a witness, as he purported by the writing to be. The subscription, in such connection, would be evidence—strong evidence—that the person subscribing intended to be a witness, but the contrary might be shown. And so, also, where the subscriber, in such connection, denied that he was such witness, it might be shown that he subscribed as such. And so, also, if the subscribing witnesses were dead, while the strong presumption would be that they were such, especially if there were a formal attesta-

tion clause, the contrary might be shown. Otherwise, the grossest injustice might be done to parties claiming under or against the will, and also to persons purporting to be witnesses, but really were not such, because of facts perfectly explicable. Theobald on Wills, 30; *In the Goods of Wilson*, L. R. 1 Pro. & D. 267; *Griffeths v. Griffeths*, L. R. 2 Pro. & D. 300; *In the Goods of Sharman*, L. R. 1 Pro. & D. 661; *In the Goods of Murphy*, 1 I. R. Eq. 300; *Crowell v. Kirk*, 3 Dev. 355; *Old v. Old*, 4 Id. 500; *Bell v. Clark*, 9 Ired. 239; *Hampton v. Hardin*, 88 N. C. 592.

It may be that, if one purporting to be a subscribing witness was examined in the course of the probate proceeding of the will, he could not afterwards be allowed to say that he was not such witness, upon the ground that it was settled and adjudged that he was; but certainly this cannot be so when the person purporting to be such witness was not examined, and not before the court, as a third witness to the will need not be, where it is proven in common form. We cannot conceive of an adequate reason why such a witness, not so before the probate court, shall be precluded, after the will is proven, from proving, before a court having jurisdiction, in a proper case, when it becomes material to do so, that he was not such witness. Not to allow him to do so might do him grievous injustice. It is true, such a witness might have a strong motive, in that the testator devised or bequeathed to him property of great value, to commit perjury or to suborn witnesses, but this would weigh against him in addition to the presumption of fact that he subscribed as a witness. The burden of proof is on him, and the greater it will be if there was a formal attestation clause to the will. Moreover, the motive to commit perjury and pervert the cause of justice is not greater in such case than in many others of equal importance. The statutory provision first above cited does not, nor does any other, in terms or by reasonable implication, prevent the person purporting to be a witness to a will from showing, in any proper case, that he is not such.

We are therefore of the opinion that the testimony offered by the appellant on the trial, which was objected to, and rejected by the court as incompetent, should have been received. If it had been received, it would have gone directly to prove that the appellant was not requested by the testator, nor did he consent, to witness the will under which he claimed; that he simply witnessed the signature of a witness to the will who

identified himself and the signature as his by his cross-mark, supposing that such attestation itself required a witness. The appellant was not examined, when the will was proven, as a witness thereto, or at all. If the facts were as the evidence rejected tended to prove, he was not such witness, and, as we have seen, he had the right to prove that he was not. So far as appears, the evidence was competent, and should have been received.

The learned counsel of the appellees, in his elaborate and well-considered argument, cited and relied upon several English cases; but upon a careful examination of them, we do not think they seriously contravene what we have said. The case most relied upon is that of *Wigan v. Rowland*, 11 Hare, 157. In that case there was a complete formal clause of attestation; the witness whose right was in question attested the signature of the two subscribing witnesses to the will, who each made his cross-mark, but he did not subscribe in terms as a witness for that purpose. The vice-chancellor held, in an opinion of about half a dozen lines, that, "upon the face of the document and of the attestation clause, the defendant Wigan must be held to be a witness to all that the clause contained." He gave no reason for or explanation of the ground of his decision, nor did he cite any authority. The case is not a satisfactory one, as it seems to us, and certainly does not harmonize with other English cases, some of which are cited *supra*. He admits the case is a hard one, and said if the parol evidence were admissible, it would not be sufficient to countervail that which the written document afforded. It would seem that his decision could rest, properly, only on that ground. In *Cozens v. Crant*, L. J., N. S., 840, the witness really subscribed his name as such to the will, and the master of the rolls held that, although the witness subscribed as a token of approval of the will at the request of the testator, such attestation invalidated the bequest, the English statute being almost precisely like that of this state. In *Taylor v. Mills*, 1 Moody & R. 288, it was held by Lord Denman, C. J., that a devise to a subscribing witness to the will was void, although there were other witnesses sufficient in number to prove the will. He said to counsel: "You assume too much; the evidence of the devisee was not wanted on this particular occasion; but it might be wanted on other occasions. Supposing all the other subscribing witnesses should die, would not the evidence of this fourth interested witness then become

necessary?" In *Bonfield v. Bonfield*, 32 L. J. 668, the witness really attested the will.

There is error. The appellant is entitled to a new trial, and we so adjudge.

WILLS — SUBSCRIBING WITNESSES. — The attestation clause, reciting that the witnesses signed in the presence of the testator, raises a presumption of that fact, which can only be rebutted by strong proof to the contrary: *Will of O'Hagan*, 73 Wis. 78; 9 Am. St. Rep. 763.

SIGNING AND ATTESTING WILLS: Note to *Maynard v. Vinton*, 60 Am. Rep. 285; note to *Waller v. Waller*, 42 Am. Dec. 571; *Matter of Mackay*, 110 N. Y. 611; 6 Am. St. Rep. 409. Subscribing witnesses must subscribe their names to the will in the presence of the testator, and the mere acknowledgment in his presence of their signatures, which were not affixed in his presence, is insufficient: *Town of Pawtucket v. Ballou*, 15 R. I. 58; 2 Am. St. Rep. 868; *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 687, and note. The requirement of the statute that a will must be attested by "at least two credible witnesses" means that it shall be attested by such persons as are not disqualified by mental imbecility, interest, or crime from testifying in courts of justice: *Fuller v. Fuller*, 83 Ky. 345. "Witness, George Penlington, 123 O'Farrell Street," written in the handwriting of another, does not show an uncompleted intention to make an attested codocil, or prevent the codocil from being olographic: *In re Estate of Soher*, 78 Cal. 447.

ADRIAN v. McCASKILL.

[108 NORTH CAROLINA, 181.]

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSERS. — One who obtains possession of a bill or note, after indorsing it, is restored to his original position, and cannot, nor can a purchaser from him with notice of the facts, hold intermediate indorsers liable who could look to him again; and when such indorsements are in blank, parol evidence is admissible to show the relation in which they stand.

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSERS. — The purchaser of a note from the original payee, bearing upon its face the fact that he was also the first indorser, is chargeable with notice that subsequent indorsers were the indorseees of the payee.

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSERS. — *Bona fide* purchaser of a note, without any knowledge or notice of the relation sustained by prior indorsers to the note, may fill a blank indorsement by making it payable to himself or any one else. This rule does not apply, however, to a purchaser from the payee or a prior indorser.

E. S. Martin, for the plaintiffs.

John D. Shaw, for the defendants.

DAVIS, J. The following is a statement of facts agreed upon:—

On the tenth day of January, 1884, one Mary J. Fairly

executed her promissory note in writing, under seal, a copy of which and the indorsements thereon are as follows:—

“\$1,386.65.

LAURINBURG, N. C., Jan. 10, 1884.

“On or before the first day of November next I promise to pay to W. C. Patterson, or order, the sum of \$1,386.65, for value received. This note to bear interest at the rate of ten per cent after maturity.

“January 10, A. D. 1884.

“Payable at the office of McCaskill & McL.

“MARY J. FAIRLY.” [SEAL]

Upon which were the following indorsements, to wit:—

“W. C. PATTERSON.

“McCASKILL AND McLEAN.”

“Received on the within note \$45.97, January 14, 1885.

“W. C. PATTERSON.”

That afterwards, in the month of January, 1885, and after the maturity of the said note, plaintiffs became the purchasers for value of the said note from the said W. C. Patterson, indorsed as above set forth, without any actual notice whatever of any of the equities or defenses set up in the answer of the defendants, who were sued as indorsers.

It is admitted that the following facts are true: That early in the year 1884 the defendants agreed with W. C. Patterson, the payee named in the note, to make advancements to him in money and goods during the year to enable him to cultivate his farm; and to secure the defendants for such advancements as they might make to him, said Patterson indorsed the said note in blank, and delivered it to the defendants in February, 1884, to be held by the defendants as collateral security for such sum or sums of money as he (Patterson) might owe them at the end of 1884; and that on the twenty-third day of February, 1884, the defendants indorsed said note in blank, and, with the knowledge and consent of said Patterson, delivered the same to George W. Williams & Co., of Wilmington, North Carolina, to be held by said George W. Williams & Co. as collateral security for money loaned to the defendants in 1884, and that the indorsement on said note by the defendants was solely to secure said George W. Williams & Co., as above stated; that on the 15th of October, 1884, the defendants paid the said George W. Williams & Co. the money borrowed of them, as above stated, and the said George W. Williams & Co. returned the aforesaid note at the same time

to the defendants; that the defendants held the said note thereafter as collateral security, as aforesaid, until the fifth day of December, 1884, when they returned said note to the said W. C. Patterson, they being satisfied to trust him for the balance then due them without said collateral security, and at the time the defendants returned said note to the said Patterson, they, by accident, oversight, and mistake, failed to erase their names as indorsers on said note; that at the time said note was returned to said W. C. Patterson it was well known too him that they were not liable as indorsers on said note, and they believe he well knew that they failed and omitted to erase their names through accident, oversight, and mistake, and that it was well known to the said W. C. Patterson, at the time the defendants returned aforesaid note to him, on the 5th of December, 1884, that the names of the defendants, as indorsers in blank, were not there for his accommodation, and that he well knew he had no legal or moral right to use their names as such, and that he well knew he had no right to deliver said note to plaintiffs, with the indorsement of the defendants in blank on the same.

The plaintiffs objected to the introduction in evidence of the said facts set up by the defendants, and insisted that, as it was admitted (as hereinbefore stated) that they had no actual notice of them, the evidence of said facts was not competent or admissible against them. His honor held that the evidence was competent, and thereupon gave judgment for the defendants as set forth in the record of this action. From this judgment the plaintiffs appealed.

The note is dated January 10, 1884, and is payable to "W. C. Patterson, or order," on the first day of November. It is indorsed by the payee and by the defendants, the name of the payee appearing as first in order. On the twenty-fifth day of January, 1885, more than twelve months after its date, and long after its maturity, the plaintiffs became the purchasers from the payee, with the indorsement as set forth.

Were the facts, admitted to be true, admissible to explain the character and nature of the indorsement of the defendants?

The plaintiffs say that as they had no actual notice of "any such equities of defense," and were purchasers for value, the evidence was not competent as against them.

By statute, promissory notes, whether with or without seal, are made assignable "in like manner as inland bills of ex-

change are by custom of merchants in England." They are, in the language of the mercantile law, "negotiable," and may be transferred and negotiated, free from any equities which exist between the original parties to them. "Each indorser, including the payee, down the line, has and passes the legal title, and his indorsement in legal import is a contract with his indorsee, and all subsequent holders by indorsement, that the maker will pay the note, or . . . he will": *Hill v. Shields*, 81 N. C. 250; 31 Am. Rep. 499, and the cases there cited; and innumerable decisions, English and American, cited in Parsons, Daniel, Randolph, and other elementary writers upon the subject, indicate the solicitude of courts to protect *bona fide* purchasers and innocent holders of negotiable paper, so essential to commerce and trade; and the construction placed upon section 177 of the code (Code Civ. Proc., sec. 55), in *Harris v. Burwell*, 65 N. C. 584, and *Martin v. Richardson*, 68 Id. 255, has been limited to the makers of promissory notes, etc., and held not to apply as between indorsers.

Conceding the importance of protecting *bona fide* holders of commercial paper "in its unchecked circulation," what are the liabilities of the defendants in the present case? That the holder of a negotiable note is presumed to be the owner admits of no question, and that, after such a note is put in circulation, indorsers are liable in the order of succession, is equally clear, if the indorsement be not limited or qualified. No prior indorser can look to any subsequent indorser. "One who obtains possession of a bill or note after indorsing it is restored to his original position, and cannot, of course, hold intermediate parties who could look to him again": 2 Randolph on Commercial Paper, sec. 719. It must be equally clear that one who derives possession from him, with notice of this fact, cannot hold such intermediate indorsers liable, and when such indorsements are in blank, parol testimony is admissible to show the relation in which they stand: Id., secs. 778, 841, 883.

When the note was returned to Patterson, he became again the owner, and, as between him and any subsequent indorsers, the relation of indorser and indorsee ceased. The plaintiffs were not the indorsers of the defendants. It is clear that Patterson could not, by reason of the blank indorsement of McCaskill and McLean, hold them liable for the note; for he stood in the relation to them of a prior indorser. The plaintiffs derived their title directly from Patterson, the original payee, who had reacquired the title, and not as successive

indorsers, deriving title through the indorsement of the defendant; and this distinguished this case from *Hill v. Shields*, *supra*, *Parker v. Stallings*, Phill. (N. C.), 590, 98 Am. Dec. 84, and similar cases.

The plaintiffs were affected with and bound by notice of what appeared upon the note itself; and they took the note from the original payee, bearing upon its face the fact that he was the first indorser, and that the defendants were his indorsees.

An indorsement in blank by the payee is presumed to have been intended as a transfer, and though this may be rebutted by parol proof (*Davis v. Morgan*, 64 N. C. 570), the admitted facts in this case show that the indorsement by the payee was in accord with the presumption,—a transfer to McCaskill and McLean.

But it is insisted that, as between the indorsers in blank, the holder may fill the blank by making it payable to himself, or to any one he may choose. This is so, where he obtains the note, not from the payee or a prior indorser, but holds it as a *bona fide* purchaser, without any knowledge or notice of the relation sustained by prior indorsers to the note. In the present case, if the plaintiffs, purchasing the note, not from the defendants, but from the prior indorsing payee, had filled the blank indorsement of McCaskill and McLean to themselves, it would not have been in accordance with what they knew the fact to be, and would have been a gross wrong, if not fraud, upon the defendants.

The plaintiffs further rely upon the well-settled rule, "that whenever one or two innocent persons must suffer loss by the acts of the third, he who by his negligent conduct made it possible for loss to occur must bear the loss, for it is against reason that an innocent party should suffer for the negligent conduct of another," and that the defendants, by neglecting to erase their indorsement, "induced the plaintiffs to rely on the legal import of the indorsement, and ought not to be allowed, against the plaintiffs, purchasers for value and without notice, to make proof of the alleged facts."

Though the plaintiffs had no "actual notice," we have already seen that they were charged in law with notice of facts apparent upon the face of the paper which they purchased from Patterson.

But the defendants may have been indorsers for accommodation, or as sureties or guarantors. True; and the indorse-

ment of a note by a third person, made at the time of its execution, binds him, according to the intention of the parties, either as joint principal or as surety: *Baker v. Robinson*, 63 N. C. 191.

If the plaintiffs looked to the defendants as accommodation indorsers, or as guarantors, then, as they purchased the note from the payee after maturity, they were not "*bona fide* holders before maturity," but had notice, as appeared upon the face of the paper, of its dishonor: 2 Randolph on Commercial Paper, sec. 672; *People etc. Bank v. Lutterloh*, 95 N. C. 495; *Chaddock v. Vanness*, 35 N. J. L. 517.

So, whether by the one way or the other, the plaintiffs cannot hold the defendants liable.

Affirmed.

NEGOTIABLE INSTRUMENTS. — As to the liability of a maker and successive indorsers of a promissory note: *Temple v. Baker*, 125 Pa. St. 634; 11 Am. St. Rep. 926, and note.

INDORSEMENT, PAROL EVIDENCE to vary or control the effect of: *Hill v. Ely*, 5 Serg. & R. 363; 9 Am. Dec. 376, and note; *Stack v. Beach*, 74 Ind. 571; 39 Am. Rep. 113, and note. If the indorsement upon the back of a note is in blank, or the names of the parties are so placed upon it or the contract is so ambiguous upon its face as to leave it doubtful what the real intention of the parties is, parol testimony may be resorted to in order to establish the true relation of the parties to the note and to each other: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870, and note; *Latham v. Flour Mills*, 68 Tex. 127; *Coke v. Pottsville Bank*, 116 Pa. St. 264.

INDORSERS AND INDORSEMENTS. — A written indorsement upon the back of an order limiting the conditions of the order, made before its present issue for acceptance, constitutes a part of the order: *Hughes v. Fisher*, 10 Col. 383. An indorsement upon a note making it payable to the order of A, who has no personal interest in the transaction, as the indorsement was really made for B, is not a transfer to B in the usual and ordinary course of business, excluding defenses by the maker against the original payee: *Elias v. Finnejan*, 37 Minn. 144. An indorsee of negotiable paper, protected in other respects against pre-existing defenses, is not put upon inquiry as to the voidable character of notes given in consideration of a parol purchase of lands by a recital in the notes that they were given for lands therein described: *Ferriss v. Tarel*, 87 Tenn. 386; *contra*, *Howard v. Kimball*, 65 N. C. 175; 6 Am. Rep. 739. An indorsement for collection passes such title to the indorsee as will enable him to sue upon the note in his own name, but he holds the note subject to the same defenses which could be made against the original payee: *Roberts v. Parrish*, 17 Or. 583. One partner, during the continuance of the partnership, has implied authority to indorse notes payable to the firm in the firm name: *Fulton v. Loughlin*, 118 Ind. 286. A negotiable note, payable to "order," must be transferred by indorsement of the payee to an innocent holder for value, before maturity, in order to invest such holder with legal title, and deprive the maker of the right to plead his equities: *Calvin v. Sterritt*, 41 Fan. 215.

Payment of a note by an indorser, who was actually bound to pay, subrogates him to the rights of the last holder of the note: *Seixas v. Goncalves*, 40 La. Ann. 351; and this is true, even though the indorser was compelled to pay by judicial proceedings, provided he takes an assignment of the judgment to himself: *Schleissman v. Kallenberg*, 72 Iowa, 338.

The signing of a non-negotiable note by a third party while such note is in the hands of the maker does not, when passed to the payee, import *per se* any contract on which a suit will lie: *Building and Loan Soc. v. Leeds*, 50 N. J. L. 399. The placing of the name of a third party upon the back of a note is *prima facie* evidence only that the liability intended to be assumed was that of guarantor, and it may be shown that the liability of an indorser merely was intended: *De Witt County National Bank v. Nixon*, 125 Ill. 615. One who, before delivery, writes his name upon the back of a negotiable promissory note, of which he is neither payee or indorsee, is, in the absence of explanatory evidence, liable merely as an indorser, but it is otherwise where the note is non-negotiable: *Pool v. Anderson*, 116 Ind. 88.

Where a firm was indebted to a bank, and the bank consented to extend the time of payment, provided the firm gave notes to secure the debt indorsed by K. & T., if K. & T. would confess judgment for the aggregate as collateral security, and where K., but not T., did confess judgment, and the bank, knowing of T.'s failure to confess judgment, promised to obtain judgment against T., but in reality did not do so, K.'s estate was liable for the whole deficiency: *Kelly v. Tallinferro*, 82 Va. 801. In an action against two joint indorsers of a note, the court directed a verdict against one and in favor of the other, when the plea was joint, and there was no pretense of severance by bankruptcy, or anything else which could terminate the liability of one and not release the other; held, the discharge of one indorser was *ipso facto* the discharge of the other: *Seligman v. Gray*, 66 Mich. 341. Where the defendants, the payees and holders of a promissory note, desired to raise money upon it and indorsed their names upon the back thereof, and applied to plaintiffs to discount it, and upon their request the defendants left the note with them for the mere purpose of allowing them to ascertain the solvency of the makers, and subsequently plaintiffs refused to discount the note or even to return it to the defendants, and thereupon defendants brought suit to recover the value of the note thus wrongfully withheld, and obtained a judgment which plaintiffs paid, the defendants were not liable upon the note as indorsers: *Huas v. Sackett*, 40 Minn. 53.

Taking security from the maker, or merely requesting the holder not to press the note against the maker, does not waive demand and notice of non-payment: *Whittier v. Collins*, 15 R. I. 44; but notice of non-payment at maturity is a privilege of the indorser, which he may waive: *Turnbull v. Maddux*, 68 Md. 579. Notice of dishonor left in a conspicuous place in defendant's office is sufficient: *Hobbs v. Straine*, 149 Mass. 212. If a paper had been indorsed to the guarantor thereof, the failure of the holder at maturity to make demand of the maker, and give notice to the prior indorser, will not discharge the guarantor: *Hungerford v. O'Brien*, 37 Minn. 306. Where notice of dishonor is sent by mail to the post-office where the note was dated and indorsed, it will be deemed sufficient when the only evidence as to his residence is that he testified he lived in Jefferson township, but said nothing as to his post-office address: *Davis v. Eppler*, 38 Kan. 629.

A claim arising out of an independent transaction, and for which a merely nominal consideration was paid, is not available as a set-off against a promissory note in the hands of an indorsee in good faith for value: *Proctor v. Cole*, 115 Ind. 15.

PARKER v. SUTTON.

[103 NORTH CAROLINA, 191.]

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER. — A collateral oral agreement between the maker and an accommodation indorser of a note that it shall be payable at a certain bank does not affect a purchaser of the note for value, and before maturity, from the maker, with notice of the agreement.

ACTION by Parker, as administrator of J. McK. Mulford, against W. J. Sutton and John A. McDowell. Judgment for plaintiff.

E. C. Lyon, for the plaintiff.

T. H. Sutton, for the defendant.

MERRIMON, J. The plaintiff brought this action to recover the money due on a promissory note, whereof the following is a copy:—

“\$1,000.

ELIZABETHTOWN, N. C., Dec. 10, 1882.

“Ninety days after date I promise to pay to Col. John A. McDowell, or order, one thousand dollars, value received, with interest after the maturity at the rate of eight per cent per annum. (Signed) W. J. SUTTON.”

This note was indorsed by the payee in blank, and afterwards the blank was filled as follows: “Pay J. McK. Mulford, or order.”

By consent of the parties, the court settled the facts as follows: “The defendant W. J. Sutton executed his promissory note for one thousand dollars, on December 1, 1882, to the defendant John A. McDowell, to pay said sum ninety days after date, with interest at eight per cent after maturity. Said McDowell indorsed said note in blank for the accommodation of the defendant Sutton, and delivered said note to him that same day. Said Sutton sold and transferred said note for full value, and before maturity, to plaintiff’s intestate. At the time of the indorsement by McDowell of the note, it was understood and agreed between him and Sutton that said note was to be negotiated in one of the banks in Fayetteville, North Carolina, and plaintiff’s intestate had notice of such understanding before his purchase of said note. At the time of the execution of said note, Sutton was not indebted to McDowell, and the indorsement by McDowell was solely an accommodation to enable Sutton to raise money. McDowell had no notice of the sale of the note to plaintiff’s intestate till after the death of such intestate, on the presentation by the plaintiff of

the note for payment. Upon the above facts, the court rendered judgment for plaintiff."

The defendant McDowell, having excepted, appealed to this court.

The note sued upon was plainly a negotiable instrument, and might, by indorsement of the payee thereof, be put upon the market and bought and sold indefinitely. The original parties to it treated it as "accommodation paper," and the facts show that the chief and material part of their purpose was to enable the maker thereof to borrow money upon it. It was expected that he would get the money from one of the banks in Fayetteville, but not necessarily from a bank, or in that town. If it had been so intended, some particular restriction in this respect would have been set forth in or about the note, but it was left at large,—entirely without such restriction,—to be sold to any person who might buy it. If a bank had purchased it, it could at once have sold it to the intestate of the plaintiff or any other person in the course of business. There was nothing in its nature, or in the purpose of the parties in connection with it, that rendered the sale of it to a bank necessary or at all material to its sufficiency or efficiency as a negotiable instrument; nor would the mere sale of it to a bank have given the payee, who indorsed it, any material legal advantage. There was no reason—certainly none that appears—why the intestate of the plaintiff should not have bought it on the same footing as a bank, or any other person might have done. The simple fact that he had knowledge of the "understanding" that the money was to be obtained from a bank in the town mentioned did not render it in any sense fraudulent on his part to buy it. This is a stronger case against the indorsee than that of *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235. The note in that case was by its terms made "negotiable and payable" at a particular bank named. It was "an accommodation paper,"—was not sold to the bank, but to a different person. Nevertheless, it was held that the indorser was liable.

The objection, therefore, that the intestate of the plaintiff had notice that it was "understood and agreed" that the note should be "negotiable in one of the banks of Fayetteville," cannot be sustained, and the judgment must be affirmed.

NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER. — Where a note was made and indorsed for accommodation, negotiable and payable at a particular bank, but was not discounted there, but sold to a private person with-

out the accommodation indorser's knowledge, the indorser was liable thereon: *Parker v. McDowell*, 95 N. C. 219; 59 Am. Rep. 235; for the maker of an accommodation note, but without restriction, is liable to a third party who acquires it for value before maturity: *First National Bank v. Grant*, 71 Me. 374; 36 Am. Rep. 334, and note; compare note to *Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 136, 138.

COMRON v. STANDLAND.

[103 NORTH CAROLINA, 207.]

APPEAL BOND, CHATTEL MORTGAGE IN LIEU OF. — There is no statute in North Carolina providing that a mortgage of real or personal property may be given in lieu of an undertaking on appeal from a judgment. Still, if the parties agree upon and execute a mortgage for such purpose, it is valid, and may be enforced as between them.

CONTRACTS — CONSIDERATION. — **STAY OF EXECUTION** is a valuable and sufficient consideration to support a chattel mortgage.

CHATTEL MORTGAGE. — **NO PARTICULAR FORM IS ESSENTIAL** to a chattel mortgage, nor will mere informality defeat its purpose. It need not be under seal, and it is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed, and such mortgage may or may not have a power of sale annexed thereto. This rule is here applied to an informal chattel mortgage given in lieu of an appeal bond, and in consideration of a stay of execution.

CHATTEL MORTGAGE. — **WHETHER OR NOT A WRITING** was intended by the parties as a chattel mortgage is a question of law to be determined by the court.

J. D. Bellamy, for the plaintiff.

T. W. Strange and Ernest Haywood, for the defendant.

MERRIMON, J. The plaintiff obtained a judgment in the court of a justice of the peace against the defendant for \$110.84, and the defendant appealed therefrom to the superior court, but failed to give an undertaking on appeal to stay execution pending the appeal, as allowed by the statute: Code, secs. 883, 884. He, however, in lieu thereof, and for the purpose of such stay, executed, and the plaintiff accepted, a paper writing, which was duly proven and registered, whereof the following is a copy: —

"STATE OF NORTH CAROLINA,
BRUNSWICK COUNTY.

"*R. R. Comron v. D. B. Standland.*

"Undertaking on Appeal from Justice's Judgment.

"Whereas, on the twenty-third day of February, 1885, the

plaintiff recovered judgment against the defendant before S. J. Stanly, justice of the peace, for \$110.84; and whereas, the said defendant intends to appeal therefrom to the superior court of said county, and desires to stay all proceedings thereon,—now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment, or any part thereof, that may be affirmed, the said D. B. Standland does give the following articles of personal property: Two mules, flesh-marks pale yellow, worth \$250; and said mules are free and clear of all encumbrances whatsoever, and that the said D. B. Standland has the right to convey the same.

“This twenty-third day of February, 1885.

(Signed)

“D. B. STANDLAND.

“Witness: (Signed) S. J. STANLY.”

The purpose of this action is to enforce this paper writing as a chattel mortgage. The defendant contends that it is not such mortgage, nor was it so intended; that it was intended to be an undertaking on appeal, but is not; that it is void, “because it did not conform to the statute, and because it is without consideration, and had no obligee named therein.”

The court submitted the following, among other issues, to the jury, and they responded to the same as stated at the end thereof:—

“Did the defendant intend the paper writing as a mortgage? or did he intend it as an undertaking to secure the plaintiff's debt on appeal?” Answer, “Mortgage.”

There was a verdict and judgment for the plaintiff.

The defendant assigned error as follows, and appealed to this court.

“1. The court erred in submitting issue No. 3 to the jury, because it was a paper writing whose terms were certain, and its construction was a matter for the court.

“2. The court erred in refusing to give the following instruction: ‘That inasmuch as a justice of the peace had the right to accept an undertaking on appeal, but no right to accept a chattel mortgage in lieu of such an undertaking, they must presume that this instrument was given in accordance with law as an undertaking on appeal, and not as a mortgage.’

“3. The court erred in sustaining the validity of this instrument,—1. Because, being void as an undertaking, it could operate as nothing else; 2. Because it appeared upon its face

that it was without consideration; 3. Because there was no obligee specified or mentioned in the instrument itself."

The statute (Code, secs. 117, 120) has no application in courts of justices of the peace, as seems to have been supposed by the parties to this action. It prescribes the duties of clerks of the superior courts, and allows a mortgage of real estate to be given by parties to actions in the cases and as and for the particular purpose specified. The statute (Code, secs. 883, 884) applies particularly to appeals from judgments in courts of justices of the peace, and it is by it provided that the appellant shall, in such cases, be allowed to give an undertaking by one or more sureties, to be approved, "to the effect that if judgment be rendered against the appellant, the sureties will pay the amount, together with all costs, awarded against the appellant; and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties." There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of and for the purpose of an undertaking on appeal from such judgment.

The defendant failed to give the undertaking on appeal from the judgment of the justice of the peace, but he gave the paper writing in question, a copy of which is set forth above.

The justice of the peace could not require the plaintiff to accept it, or a like instrument; nor did the defendant have any right to require him to accept it, in the absence of statutory provision so prescribing, but there was no legal reason why the plaintiff, if he saw fit, for any consideration, might not accept it, and allow the stay of execution as a consideration for it. He had the right, in the absence of the usual undertaking on appeal, to issue execution (Code, sec. 875), and he might not stay it pending the appeal, and thus the defendant might have suffered harm or disadvantage. There was no legal obstacle in the way to prevent the arrangement made voluntarily by and between the parties for their common convenience.

The paper writing, called "an undertaking on appeal," is very informal, but it is not wholly insensible,—its nature and purpose are obvious. The defendant intended by it to mortgage the two mules described therein to the plaintiff, for the purpose therein specified, in order to obtain the stay of execution, and the plaintiff accepted the mortgage, as he might do.

The stay of execution was a valuable and sufficient consideration to support the contract of mortgage. The names of the parties to it were mentioned in the caption at the top of it, and plainly, the stipulations and agreement embraced in the writing had reference to and were between them, and sufficiently pointed and expressed their mutual agreement,—they were respectively designated certainly as plaintiff and defendant. The expressed purpose was to obtain the stay of the execution referred to for the benefit of the defendant; and to secure the payment of so much of the judgment mentioned therein as might be affirmed in the appellate court, the defendant “do [doth] give the following articles of personal property, two mules, flesh-mark pale yellow,”—that is, the mules were given, sold, to the plaintiff to secure the payment of the judgment he expected to obtain. This was the obvious implication from the words employed and the nature of the transaction. The condition implied was, that the mules shall be sold, and the proceeds of sale applied to the payment of the judgment, when obtained, if the defendant should fail to pay it; and if the judgment, or some part of it, should not be affirmed in the appellate court, then the mules revert in and be the property of the defendant: *Holly v. Perry*, 94 N. C. 30.

No particular form is essential to the validity of a chattel mortgage, nor will mere informality defeat its purpose. It is not necessary that it shall be under seal, because the title to personal property will pass without deed. It is sufficient, if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed, and the mortgage may or may not have a power of sale annexed thereto: *Rawlings v. Hunt*, 90 N. C. 270; *McCoy v. Lassiter*, 95 Id. 88; *Frick v. Hilliard*, 95 Id. 117.

The law determined the legal nature and effect of the instrument in question, and hence the court should have decided upon it without submitting to the jury the question whether or not it was intended to be a mortgage. But any objection on this account was obviated by the finding of the jury, which was in harmony with the law applicable. The submission of the issue did no harm, in view of the finding upon it.

A remaining assignment of error is so imperfect that we cannot pass upon its merits. A paper writing essential to it

does not appear in the record. Hence we pass it without further notice.

Affirmed.

CHATTEL MORTGAGES need not be under seal: *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203. No particular form is essential to make an agreement operate as a chattel mortgage; and even though the terms used naturally imply something else, if it is plain that a mortgage was intended by the parties, it will be so construed: *Merrill v. Ressler*, 37 Minn. 32; 5 Am. St. Rep. 822. Even an oral mortgage, unaccompanied by possession, is valid as a chattel mortgage between the parties: *Bates v. Wiggin*, 37 Kan. 44; 1 Am. St. Rep. 234, and note as to parol mortgages.

RICE v. JONES.

[103 NORTH CAROLINA, 228.]

GARNISHMENT OF NEGOTIABLE INSTRUMENTS.—The *bona fide* holder of a note indorsed to him before maturity may recover of the maker the amount thereof, with interest and costs, notwithstanding the fact that such maker has been examined in a supplementary proceeding against the payee, to which the holder was not made a party, and in which the maker admitted the indebtedness to the payee, and under order of court paid part of the amount due on the note to the plaintiff in such proceeding. To protect himself, the maker should have put the ownership of the note in issue in the supplementary proceedings.

Charles A. Moore, for the plaintiff.

F. A. Sondley, for the defendants.

MERRIMON, J. The following is a copy of the material part of the case settled on appeal: On the eleventh day of December, 1882, R. R. Jones, the intestate of the defendant J. R. Jones, executed his promissory note, under seal, to John S. Rice, for three hundred dollars, to be due on the first day of August, 1883. In July, 1883, certain judgment creditors of John S. Rice instituted proceedings supplementary to execution against said John S. Rice, and caused to be issued from the superior court of Buncombe County, wherein the same had been begun, a notice of an order therein made, requiring said R. R. Jones to appear before the clerk of the superior court of Buncombe County, at a time and place named, to answer concerning his indebtedness to said John S. Rice, and said notice to be immediately served upon said R. R. Jones; and in obedience to said order said R. R. Jones appeared before said clerk on the twenty-first day of August, 1883, and on oath made answer in writing as follows: "That he borrowed from the said John S. Rice, on

or about the eleventh day of December, 1882, the sum of three hundred dollars, for which he gave his note, secured by a deed of trust, to be due the first day of August, 1883, and that the same has not been paid, and that he is ready to pay the same according to order of court. . . . That since he has been summoned in this cause (the supplemental proceedings) the note has been presented to him by Marion Rice (plaintiff in this action), brother of John S. Rice, claiming it to have been transferred to him, the said Marion Rice." Afterwards, on the thirty-first day of August, 1887, said R. R. Jones amended his said answer in said supplemental proceedings by adding thereto the following: "By leave of court, R. R. Jones, amending this his answer in these cases, demands, that if it shall be adjudged that R. R. Jones pay to any person or persons in these actions, or in either of them, any sum or sums of money, his, the said R. R. Jones's notes, in the answer mentioned, may be delivered up to him, and a deed of trust, given by himself and wife to secure the same, may be ordered to be canceled, and that such other orders may be made by the court as are necessary for his protection, and alleges that he has now of the money mentioned in his answer only \$201.45, heretofore condemned."

Before said R. R. Jones made this amendment to his said answer, the clerk of the court had made an order, based upon his original answer, in words and figures following, to wit:—

"It is considered by the court, upon the examination of R. R. Jones, and it is hereby adjudged, that the sum of \$201.45 of this \$300 due from the said R. R. Jones to the said John S. Rice be, and the same is hereby, condemned to the use and satisfaction of the judgments, and that said R. R. Jones is hereby directed to satisfy the said judgments as herein stated, and that he is prohibited from paying a sum sufficient to satisfy the said judgments to any third person.

"August 21, 1882. E. W. HERNDON, Clerk Superior Court."

From this order John S. Rice appealed, in words and figures following, to wit:—

"From the foregoing judgment John S. Rice appeals to the superior court in term, before the judge. Notice of appeal given in open court, August 21, 1883.

"E. W. HERNDON, Clerk Superior Court."

But such appeal was not heard until the present term of this court, when, upon an issue submitted to a jury in this action,

It was found that said note was the property of said J. M. Rice, having been assigned to him before said supplemental proceedings were begun. Upon this verdict, the order made by the clerk on the 21st of August, 1883, was vacated and set aside. The issue as to the title to the note was one between a receiver, appointed by consent in the said supplemental proceedings, at this term, and the plaintiff in this action, J. M. Rice, by consent of the receiver, was allowed to intervene in this action, and to make up an issue as to the ownership of the note sued on,—this to be without prejudice to defendant. After this issue was determined by the jury in favor of the plaintiff, the defendants in this action agreed that the plaintiff was the owner of the note.

On the 27th of August, 1883, said R. R. Jones paid said J. M. Rice (Marion Rice) all of said note except the sum of \$201.45, and this amount so paid was entered by said J. M. Rice as a credit upon the back of the note. It was set forth in said entry that the sum thus paid was the principal and interest of said note, except the amount for which R. R. Jones had been garnished in said supplemental proceedings.

On the sixth day of March, 1885, J. M. Rice began the present action in this court against said R. R. Jones and wife, and S. H. Reed, the trustee in the deed of trust made to secure said note to John S. Rice, which deed of trust was executed on December 11, 1882, to compel the trustee to sell the land in said deed of trust mentioned, in order to the payment of the remainder of said note. The pleadings in this action will go up as part of the case on appeal. R. R. Jones was at all times ready to pay the said note, always keeping in bank for that purpose the amount of money, upon which he received no interest or profit, and of which he made no use, but his money was at all times under his own control, and subject to his own order. He never paid or offered to pay said money into court, otherwise than as stated in his affidavit in said supplemental proceedings and in his answer in this action; nor did he take any steps in said supplemental proceedings to have J. M. Rice, the plaintiff in this action, whom he knew claimed to be the owner of said note, substituted in his place, nor did he at any time, in this action, seek to have the creditors, at whose instance said supplemental proceedings were begun, substituted in his place. J. M. Rice was never made a party to said supplemental proceedings at the instance of R. R. Jones, but he was summoned in said proceedings on the twenty-seventh day of

May, 1885, after this action was begun, to answer concerning his indebtedness to John S. Rice.

When this action was called for trial, the defendants insisted that it ought to be dismissed: 1. Because the plaintiff could not maintain such action pending such supplemental proceedings and injunction; 2. Because the court had not jurisdiction of the action; and they contended further that the plaintiff was not entitled to interest during the injunction, nor to recover costs. The court was of opinion that the plaintiff was entitled to bring his action; that the court had jurisdiction; and that, as the defendants did not insist upon having any issues tried by a jury, but consented that the court might act upon the facts found by the court, the plaintiff was entitled to recover, and gave judgment accordingly. The defendants excepted to the judgment as follows: 1. Because the court gave judgment in favor of the plaintiff and against the defendants, as set forth; 2. The plaintiff cannot maintain such action begun, pending such supplemental proceedings and injunction; 3. The court had not jurisdiction of the action; 4. The court should not have allowed the plaintiff interest on said sum of money during the injunction; 5. The court should not have allowed the plaintiff costs herein; 6. The court should have dismissed said action.

There was judgment for the plaintiff, from which the defendants appealed to this court.

It appears that the promissory note sued upon was indorsed to the plaintiff before it matured, and that he was the owner thereof. He was, therefore, entitled to recover the balance of the money due upon it—more than two hundred dollars—in this action, unless, as contended by the appellants, the proceedings had, affecting the maker thereof, in the proceeding supplementary to the execution mentioned interfered with and obstructed the plaintiff's right to maintain the action. Hence it is necessary to ascertain what relation the maker of the note sustained to this proceeding, how he was affected by it, and how, through him, it affected, indirectly if at all, the rights of the plaintiff.

Now, John S. Rice was the payee of the note sued upon, and he was also the judgment debtor and defendant in the proceeding supplementary to the execution. The maker of this note, as his supposed debtor, was required to appear before the proper court, at a time and place specified, to answer concerning his indebtedness to the payee thereof, as allowed

by the statute: Code, sec. 490. The purpose of such appearance and answer was to ascertain whether he owed such judgment debtor the note mentioned, or any sum of money. If it appeared that he did, then the court might have ordered that such indebtedness, or so much thereof as might have been necessary, should be applied to the satisfaction of the judgments against the judgment debtor, as allowed and required by the statute: Code, sec. 493. If, however, he denied in his answer that he owed the judgment debtor the note, or any sum of money, then the receiver appointed or to be appointed in the proceeding against the judgment debtor in such cases, as prescribed by the statute (Code, sec. 494), might have brought his action to recover the money alleged to be due upon the note or otherwise: *Coates v. Wilkes*, 92 N. C. 376; *Coates v. Wilkes*, 94 Id. 174; *Turner v. Holden*, 94 Id. 70; *Vege-lahn v. Smith*, 95 Id. 254.

In an action thus brought by the receiver, he could not recover, against an alleged debtor, money alleged by him to be due upon a promissory note, unless he should allege and prove that the note outstanding was still due and owing, at the time he brought his action, to the judgment debtor, because, as the note was negotiable, it might, in good faith, have passed into the hands of some other person before the order forbidding the transfer of the judgment debtor's property. Indeed, this would be so as to any debt that might be assignable by indorsement or otherwise. The receiver could only recover debts due and owing to the judgment debtor, and the burden is upon him to show that the debt he demands judgment for is so due, whether the same be due by promissory note or otherwise. If the maker of such note is sued upon the same by a receiver, he should be careful not to admit, incautiously, that it is due and owing to the payee thereof, or the judgment debtor, because it may be that the latter has sold it to some other person, and he is not bound to give the maker notice that he has done so. If the maker should make such admission, and judgment should be obtained against him by the receiver, it would not at all protect him against a recovery on the same account by the owner of the note in an action brought by him for that purpose, unless he was a party to the action of the receiver. The real owner of the note could not be prejudiced, much less concluded, by a judgment against his debtor, founded upon his note, in an action to which he was not a party, nor do orders of restraint or injunction affect him, unless in some way he is

a party to it, except so far as to prevent him from interfering with property of any kind in *custodia legis*.

The maker of the note (the subject of this action), who is the intestate of the defendant and appellant J. R. Jones, administrator, in his answer, made in his lifetime, in the proceeding referred to, did not deny that he owed the note in question to the judgment debtor therein; on the contrary, he, in substance and effect, admitted that he did owe it to him, and thereupon the court made an order applying so much of the money due upon it, or as was necessary to the satisfaction of the judgments against the judgment debtor specified in the proceedings. He made such admission at his peril. He seems to have done so, supposing that the court could and would protect him at all events against the plaintiff and the real owner of the note, whoever he might be. This was a serious mistake. The cautionary course open to him was to put the ownership of the note in issue by his answer, and in that case no order could have been made to his prejudice, but the receiver would have been driven to his action, as allowed by the statute (Code, sec. 497), and to prove that the judgment debtor was the owner of the note, as pointed out above. The maker of the note, when required to answer, was to a large extent affected by the principles of law applicable to and much on the footing of a garnishee in attachment proceedings: *Myers v. Beeman*, 9 Ired. 116; *Ormond v. Moye*, 11 Id. 564; *Shuler v. Bryson*, 65 N. C. 201; *Ponton v. Griffin*, 72 Id. 362.

The plaintiff was not a party to the proceeding mentioned, and was not bound by it in any respect, so far as appears. The mere fact that he was required to answer concerning his indebtedness to the judgment debtor did not make him a party. He was not required or summoned to appear for such purpose; nor was he required or expected to take notice of what others might answer or do in the proceeding. Indeed, it was not the purpose of the proceeding to litigate the rights of persons required to appear and answer, as to property of the judgment debtor and debts alleged to be due to him, and this denied, by the alleged debtors; this could and should be done in proper actions brought by a receiver appointed, in part, for that very purpose: Code, secs. 494, 497.

The order directing the maker of the note to apply so much of the money due upon it as might be necessary for that purpose to the satisfaction of the judgments specified in the proceeding, and forbidding him to pay such sum "to any

other person," applied to him, and was founded upon his admission that he owed the note to the judgment debtor; it did not purport to apply to the present plaintiff, or to prohibit him from asserting any right he might have against the maker of the note, nor, indeed, could it affect him, if so intended; as he was not a party to the proceeding. The court had not jurisdiction of himself, nor control of his note, the subject of this action. Moreover, the statute pertinent (Code, secs. 494, 497) did not authorize the court to make such order applicable to and embrace property other than that of the judgment debtor. It is not its purpose to interfere with the property or rights of persons other than such debtor, or to delay or obstruct the enforcement of their rights, unless incidentally, in cases where the court had taken jurisdiction of the property, and placed it *in custodia legis*. Of course a person claiming property properly alleged to be that of the judgment debtor would interfere with it in the face of an order of the court forbidding interference with it at his peril. If his claim were unfounded, he might be treated as in contempt of the court, and he would also be exposed to an action by the receiver appointed or to be appointed in the proceeding, in aid of its purposes.

We can see no just reason why the plaintiff is not entitled to interest on his debt. The note sued upon was his, and he was in no default. The maker of it, when required to answer in the proceeding, should not have admitted that he owed the judgment debtor; he did so at his peril, and it was his folly that he did; he should have put the ownership of the note in issue, and if the court had, in that case, made unwarranted orders, he should have appealed to the proper court, and had the errors corrected. In case of an action by the receiver as pointed out above, he might have required the present plaintiff to be made a party, and had his rights settled and him concluded; and besides, in that case, the court could and would, if need be, have afforded the maker of the note ample protection in some way allowed by law. The maker of the note seems to have thought that, inasmuch as he was required by the court to answer in the proceeding against the judgment debtor, the court could and ought, in any case or contingency, to afford him protection in all respects against the owner of the note, whoever he might be. This was a mistaken view of his right, liability, and duty. It was his duty to himself to require judgment creditors in the proceeding, in the way pre-

scribed by law, to establish his indebtedness to the judgment debtor, and it was his default if he failed to do so. Pending the litigation, he continued to have the money not yet paid; it was his, and if he failed to use it profitably, it was because of his neglect or his misfortune, and the plaintiff should not be prejudiced by his default or neglect as to interest. It is a part of the burden of every debtor to pay his debts certainly to him to whom it is due, and entitled to have the money in discharge of the same. If some time, in the complicated course of business, he finds it difficult and troublesome to ascertain to whom it is due, and to get a valid discharge of it, this may be his misfortune, and a necessary evil incident to business transactions. Any incidental loss is his, if the creditor is in no default.

In the present case, the creditor was in no default; the maker of the note had notice of who he was, and instead of paying the debt to him, improperly admitted that the debt was due to the judgment debtor, believing, no doubt, the order of the court would be his sufficient protection. And so it would be in the case presented; but it could not be in another and very different case. The court is faithful, true, and just in the enforcement of its orders and judgments in every case; but the extent and compass of these orders and judgments, and their effects, depend materially upon the facts upon which they are founded and rest. If the facts admitted, or made to appear from evidence produced, are, indeed, not facts, then the court cannot make the order on judgments apply to and embrace other and different facts or cases. Nor was there the slightest reason why the plaintiff was not entitled to costs. He had a good cause of action, and was properly allowed to recover; no sufficient reason was shown why he should not, and he was entitled to costs as a lawful consequence. An issue of fact, by consent of parties, was irregularly interjected into the case and tried; but the finding upon it was in favor of the plaintiff. So far as appears, there was nothing in this that deprived the plaintiff of costs in the regular course of the action.

We think that the numerous authorities cited and relied upon in the interesting brief of the counsel for the appellants are not applicable to this case. Those of them deemed most nearly pertinent are cases where the property in question was certainly in the custody of the law,—there had been levies upon it in attachment proceedings. In some such cases, the

owner of the property could not be allowed to interfere with it pending such custody, unless, in some cases, he might intervene by appropriate proceeding. In this case, there was no levy upon the property; nor was the note, the subject of this action, in the custody of any party to the proceeding; nor did or could the appropriate order of the court in the proceeding against the judgment debtor apply to persons who did not have property of the latter; nor did or could it properly forbid the owners of promissory notes, properly and in good faith indorsed by the judgment debtor when he might do so, from suing upon the same, certainly not unless such persons were in some way made parties to the proceeding. Perhaps the plaintiff might have intervened in the proceeding mentioned. Perhaps he might have been brought into it in some way that might have brought about a settlement of his rights, or have concluded him as to the note; but he was not bound to assert his rights in and by it. He had possession, and was the owner of the note sued upon in this action; and there was no imperative reason why he should seek his remedy against his debtor in the proceeding simply because the latter had been required to appear in it, and answer as to his indebtedness to the judgment debtor. It was the duty of the maker of the note, to himself, to take care in the proceeding, and be sure to require the receiver to establish his indebtedness to the judgment debtor, or fail in his action.

There is no error, and the judgment must be affirmed.

BONA FIDE HOLDERS OF NEGOTIABLE INSTRUMENTS for value, having purchased before maturity without notice, acquire title against the world, and may recover the amount of the instruments in full: *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477; and note; *Bedell v. Herring*, 77 Cal. 572; 11 Am. St. Rep. 307, and extended note; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and note 34, 35; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375, and note; *East Birmingham L. Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73. But defenses, such as a want of consideration, may be made to notes which have been transferred to parties who are not *bona fide* purchasers for value before maturity: *Fifth Nat. Bank of New York City v. Edholm*, 25 Neb. 741; and an assignment of a note by a payee after maturity is subject to all equities and defenses of the maker against the payee: *Graves v. Mining Co.*, 81 Cal. 304. Yet as between the original parties to commercial paper, the consideration may always be inquired into: *Wilson v. Ellsworth*, 25 Neb. 247. Negotiable notes given for the purchase-money of land sold under a parol contract are voidable before, but not after, they have been purchased by a *bona fide* holder for value in the usual course of trade: *Ferriss v. Tavel*, 87 Tenn. 386. The payment of a negotiable note to the original payee, after he has indorsed and delivered it, even as collateral security, is no defense as against the indorsee, even though payment was

made without knowledge of the transfer of the note: *Goelling v. Griffin*, 85 Tenn. 737. A bank was not a *bona fide* purchaser for value where it discounted a note for a company, and credited the amount on the company's account, and the credit so increased that, at the date of suit on the note, the bank had parted with nothing of value: *Manufacturers' Nat. Bank v. Newell*, 71 Wm. 309. A *bona fide* pledgee of a note, which was executed without consideration, cannot hold the maker liable thereon to any greater extent than the amount of debt for which it was pledged: *Bell v. Bean*, 75 Cal. 83.

MOFFITT v. CITY OF ASHEVILLE.

[103 NORTH CAROLINA, 237.]

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE. — The liability of a city or town for the negligence of its officers or agents depends upon whether it is exercising governmental duties, or powers and privileges conferred for its own benefit.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE. — Municipal corporations, acting within the purview of their authority, and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE. — Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the public benefit, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute imposes such liability; as, for example, a city is not liable in damages for an assault with excessive force, committed by its peace-officer in making an arrest for an assault.

MUNICIPAL CORPORATIONS — DUTIES AND LIABILITIES IN RELATION TO PRISONS. — Under the constitution and laws of North Carolina, a city is liable in damages only for a failure, either to so construct its prison, or to provide it with fuel, bed-clothing, heating apparatus, attendance, and such other things necessary, as to secure to the prisoners committed to it a reasonable degree of comfort, and protect them from such bodily suffering as would injure their health; and when the city has complied with such requirements, it is not liable for the sickness or suffering of a prisoner, even if caused by the neglect of the jailer, policeman, or attendants to keep fires burning all night, or to give the prisoner necessary bed-clothing.

MUNICIPAL CORPORATIONS — DUTIES IN RELATION TO PRISONS. — It is the duty of the governing officers of a municipal corporation to exercise ordinary care in procuring articles essential to the health and comfort of prisoners in its prison, and of superintending their subordinates in immediate control, so far, at least, as to replenish the supply of such necessary articles, when notified that they are needed, and of employing such

agents, and raising and appropriating such money, as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLECT OF JAILERS. — Neither counties nor towns are required, as a general rule, to answer in damages for injuries to prisoners caused by the neglect of their respective jailers, policemen, or guards, who may have immediate charge and custody of them, and of which the governing officials of such corporations have no notice.

MUNICIPAL CORPORATIONS — LIABILITY IN RELATION TO PRISONS. — Where the window-glass in the window of a police prison has been broken, and the bed-clothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such superintendence of the prison as would naturally be expected to give them timely information of its condition, there is not such failure in discharging their duties as will subject the corporation to liability in damages, in the absence of proof that they retained careless or incompetent jailers or servants after notice of their character.

ACTION for damages in consequence of being confined in the city prison of Asheville. It was alleged that in the room where plaintiff was confined a number of the window-panes on opposite sides were broken out; that the room was without fire, bed, or other means provided for heating it. The evidence as to these allegations was conflicting. The following instructions were presented by the defendant:—

“1. That before the plaintiff can recover in this action he must allege and prove that he sustained an injury whereof the proximate cause was the negligence of the city defendant or its authorities; and it has not been alleged, and there is no evidence, that such negligence existed or was such proximate cause.

“2. If the jury shall find that the plaintiff contributed in any manner to his own injury, if any injury he sustained, either by drunkenness and walking in open air on a very cold night without his coat, or by declining to obey the advice of his physician and go to bed, or in any other manner which the testimony may show, then he is not entitled to recover.

“3. The defendant was bound to use only ordinary care under the circumstances, and there is no evidence showing or tending to show any want of ordinary care on its part. If, therefore, the jury should find that the plaintiff was injured by the window-panes being out in the prison, they must, in order to render the defendant liable, show that this fact was known to the city authorities, or that the windows had been out for such a length of time as they would ordinarily have

known it; and of these things there is no evidence. If the jury shall find that there was no coal or other fuel wherewith to build a fire sufficient, or that the fire built was insufficient, to warm the room, or that the machinery provided for warming the room was insufficient for that purpose, they must further find, in order to render the defendant liable, that these things were known to the city authorities a sufficiently long time beforehand to enable them to remedy the same; and of this there is no evidence. If the defendant supplied in the cell, where it is alleged the plaintiff was confined, blankets in sufficient numbers to provide for plaintiff under circumstances which might reasonably have been anticipated, the plaintiff would not be entitled to recover.

“4. The plaintiff must satisfy the jury, by a preponderance of evidence, at least, that the injury he sustained, if any, was the proximate result of the negligence of the defendant, and if the jury shall be of opinion that such injury was brought about, even in part, by the negligent acts of the plaintiff, whether in going about without his coat in cold weather, or otherwise, the plaintiff would not be entitled to recover, but in order to such recovery the jury must be satisfied, by a preponderance of the evidence, that the exposure of the plaintiff in the prison, and without his fault, was the sole cause of his injury, not in any way aided by anything else wherein the plaintiff failed to exercise ordinary care. The plaintiff must be without fault in that regard, and take such care of himself as a man of ordinary prudence would, in order to entitle him to recover. The city can be liable to plaintiff in no event except for its own negligence. It cannot be liable for the tortious negligence of its police-officers.

“5. If the plaintiff sustained an injury by reason of the failure of the defendant to anticipate and provide against an extraordinary cold night, he cannot recover therefor. Before the plaintiff can recover for an injury, he must show by a preponderance of evidence that the injury was the ordinary or probable consequence of the act complained of.

“6. If the plaintiff might have avoided the consequence of the act of defendant, if such act existed, by the exercise of ordinary care, he cannot recover.

“7. If a wrong and resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage

are not sufficiently conjoined or concatenated, as cause and effect, to support an action. It is not only requisite that the damage, actual or inferential, should be suffered, but this damage must be the legitimate consequence of the thing amiss. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

But the court declined to instruct the jury except as follows: "The plaintiff must prove, by the preponderance of the evidence, that the injury that he sustained was the immediate and proximate result of the negligence of the defendant. It must appear, from the testimony, that the imprisonment of the plaintiff by the defendant, and the carelessness or neglect of defendant or its agents in providing sufficient bed-clothing or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he has sustained. If there appears to be any cause independent of the conduct of defendant, and intervening between the acts and omissions complained of and the injury, to which the same may be referred and traced, the plaintiff cannot recover. If the injury is the natural and usual result of the act or omission of defendant, and the plaintiff be without fault himself, there may be a recovery. In determining the cause of plaintiff's injury, the jury may consider whether the plaintiff exercised prudence and ordinary care, such as would suggest themselves to prudent and cautious men in the preservation of their health and bodies, and so conducted himself. If the injury may be attributed to the negligence of plaintiff upon the occasion referred to in imbibing intoxicating liquor excessively, and in exposing himself to the inclemency of the weather without suitable or necessary clothing, or if the said injury resulted from his inattention to his person after the imprisonment, the plaintiff cannot recover, except as hereinafter explained. The plaintiff, however, can recover, though he was in fault himself to some extent, if the injury complained of could not have been arrested by the exercise of ordinary care on his part. When the negligence of the defendant is the proximate cause of the injury, and the negligence of the plaintiff is remote, consisting of some act or omission on his part not occurring at the time the injury is such, the plaintiff may

recover. It is the duty of the defendant to provide for the comfort of its prisoners in a reasonable manner. It was its duty to furnish everything essential and necessary to accomplish this. These necessities must, of course, conform to the exigencies of the time and season. There must be proper ventilation, sufficient bed-clothing, suitable heating apparatus, operated as occasion may demand. The cell must be protected in such a manner as to prevent the inblowing of cold winds of winter. The prisoner must be treated in a humane manner. If the defendant has neglected its duty in respect of any of these requirements, and injury has been sustained by the plaintiff by reason thereof, he is entitled to be compensated therefor. The defendant would not be required to provide against unforeseen, unusual, and extraordinary exigencies, such as might not be reasonably anticipated. If, therefore, the injury of the plaintiff may be attributed to circumstances attending his imprisonment, which could not have been reasonably anticipated and provided for by the defendant, the plaintiff could not recover damage. It was the duty of the plaintiff to conduct himself prudently, and if he did not do so, and failed to exercise ordinary care and prudence, the defendant is entitled to a verdict. If the injury sustained by the plaintiff resulted from the carelessness of the defendant or its officers, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as a compensation, although the illness of the plaintiff may not have resulted from the imprisonment as alleged, still the plaintiff would be entitled to compensation for any sufferings and pains he may have endured during the time of his incarceration by reason of the negligence of the defendant." To this charge, as given, defendant excepted, and appealed.

Charles A. Moore and M. E. Carter, for the plaintiff.

F. A. Sondley and Theodore F. Davidson, for the defendant.

AVERY, J. The liability of cities and towns for the negligence of their officers or agents depends upon the nature of the power that the corporation is exercising when the damage complained of is sustained. A town acts in the dual capacities of an *imperium in imperio* exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit.

When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality: Shearman and Redfield on Negligence, secs. 123, 126; Dillon on Municipal Corporations, 966, 968; Thompson on Negligence, 734; *Meares v. Wilmington*, 9 Ired. 73; 49 Am. Dec. 412; *Wright v. City of Wilmington*, 92 N. C. 156; Wharton on Negligence, sec. 190; 10 Myer's Fed. Dec., sec. 2327. The grading of streets, the cleansing of sewers, and keeping in safe condition wharfs, from which the corporation derives a profit, are corporate duties: Whitaker's Smith on Negligence, 122; *Barnes v. District of Columbia*, 91 U. S. 540-557; *Treightman v. Washington*, 1 Black, 39; Wharton on Negligence, sec. 262.

On the other hand, where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence: *Hill v. Charlotte*, 72 N. C. 55; *State v. Hall*, 97 Id. 474; 2 Dillon on Municipal Corporations, secs. 965, 975; *Dargan v. Mayor*, 31 Ala. 469; 70 Am. Dec. 505; *City of Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218; Wharton on Negligence, secs. 191, 260; *Hill v. City of Boston*, 122 Mass. 344; 23 Am. Rep. 332; Shearman and Redfield on Negligence, sec. 129. As illustrations of the principle last stated, it has been held that a city is not answerable in damages for an assault with excessive force committed by a police-officer in the attempt to enforce a city ordinance, or for the negligent or unnecessary killing by a peace-officer of a citizen whom he is attempting rightfully to arrest. Many cases, illustrating by example the principle that municipal corporations are exempt from liability when acting as agents of the state, and exercising governmental power, will be found collected in *Donohue v. City of Brooklyn*, 51 Hun, 563; 39 Alb. L. J., No. 17.

The plaintiff was arrested for an assault committed in the

presence of the peace-officer of the city who arrested him, and the officer was unquestionably exercising a right; in fact, discharging a duty to the public: Code, sec. 3808, 3810, 3811, 3818; Private Laws, 1883, c. 111, sec. 59.

The city of Asheville was not, therefore, answerable in damages to the plaintiff for any violence or negligence on the part of its officials towards him up to the moment when he was committed to the city prison.

When we follow the plaintiff across the portal of the prison we are confronted with the new question, whether there is any provision of law creating a liability (expressly or by implication) on the part of the city for injury to the health of or for the bodily suffering of the plaintiff, caused by the neglect of the city or its agents in the construction of the prison or the subsequent superintendence of it. Section 6, article 11, of the constitution, and section 3464 of the code, are as follows: Sec. 6, Constitution, art. 11: "It shall be required by competent legislation that the structure and superintendence of the penal institutions of the state, the county jails and city police prisons, secure the health and comfort of the prisoners," etc. Code, sec. 3464: "The sheriff, or keeper of any jail, shall every day cleanse the room of the prison in which any prisoner shall be confined, and cause all filth to be removed therefrom; and shall furnish the prisoner a plenty of good and wholesome water, three times in every day; and shall find each prisoner fuel, one pound of good wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance."

Section 3465 of the code imposes upon the county commissioners the duty of purchasing "a number of good warm blankets, or other suitable bed-clothes, which shall be securely preserved by the jailer, and furnished to the prisoners for their use and comfort, as the season or circumstances may require."

It is not necessary to decide whether the substitution in the code of the term "keeper of any jail," instead of "keeper of any public prison" (in section 9, chapter 89, Battle's Revision, quoted in *Lewis v. Raleigh*, 77 N. C. 229), limits the responsibility of towns, or whether jail, as the generic term, includes every kind of prison, or whether section 3465 of the code applies to police prisons at all.

The aldermen of Asheville were vested with authority to erect a city prison by section 47, chapter 111, Private Laws of 1883, if they did not have the power by implication under the

general law in reference to towns; and when they built the police guard-house in the exercise of their power, the city became as fully amenable for its proper structure and superintendence as the general assembly was required by the constitution to make it answerable by competent legislation.

The defendant, in the discharge of its judicial duties, could not have incurred any liability in any view of the case but for the express provisions of the constitution and laws: Dillon on Municipal Corporations, sec. 975 (773); *Hill v. Charlotte*, *supra*.

By a well-known rule, therefore, the law imposing this responsibility on such municipal corporations for the proper structure and superintendence of their prisons must be construed strictly.

We hold that the defendant is liable in damages only for a failure, either to so construct its prison or so provide it with fuel, bed-clothing, heating apparatus, attendance, and other things necessary as to secure to the prisoners committed to it a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health.

If the aldermen of the city built a reasonably comfortable police prison, and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners from excessive cold or heat or hunger, and to protect their health, the city would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer, the policemen, or the attendants to keep the fires burning all night, or to give the plaintiff the necessary bed-clothing furnished to them: *Shearman and Redfield on Negligence*, sec. 139, and note 2.

The word "superintendence" means oversight or inspection, and was intended, as used in the constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisons (so far, at least, as to replenish the supply of such necessary articles when notified that they are needed), and of employing such agents, and raising and appropriating such amounts of money, as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates: *Threadgill v. Commissioners*, 99 N. C. 352. The rule in reference to the liability of counties for torts is always the same as that which applies to

cities and towns when exercising governmental duties. Counties are never answerable in damages for torts, unless made so by the provisions of some statute, either expressly or by necessary implication: *Bowditch v. Boston*, 101 U. S. 16; *Dillon on Municipal Corporations*, secs. 963, 965.

In *Threadgill v. Commissioners*, *supra*, Chief Justice Smith, for this court, after laying down the rule that a county is required to provide money to repair public buildings, other than prisons, by the provisions of the code, section 707, subsections 5, 6, and 7, says: "The doctrine is, that while these corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial service, and the default to make them liable must be in neglecting to exercise their authority in the use of labor and money for that purpose, and so it must be charged to make a cause of action against them." It is true that this language was used in reference to the liability imposed by the code upon the board of commissioners, as representing the county, for a failure to have the public privies cleaned, and allowing them to become a nuisance.

But the reasoning and the principle apply to the general duty of building and overlooking prisons, imposed by the constitution upon counties and towns in the very same language, and the statutes (Code, secs. 3464, 3465) are, if there is any difference, more stringent as to the duty of county commissioners and county jailers in providing and caring for prisoners in the county jails, than they are towards town authorities and keepers of police prisons.

However the general question of the liability of counties, by virtue of this legislation, may hereafter be settled, we may safely say that neither counties nor towns can be required, as a general rule, to answer in damages for injuries to prisoners, caused by the neglect of their respective jailers, policemen, or guards who may have immediate charge and custody of them, and of which the governing officials of the corporation had no notice.

We think that where window-glass in the window of a police prison has been broken, and the bed-clothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such oversight of the prison as would

naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence as to subject the corporation to liability. We do not wish, however, to be understood as intimating that a city or town would not be liable, if it should retain incompetent or careless jailers or servants after notice of their character, for damages caused by their negligence, though the question is not directly presented in this case.

It naturally follows, from giving our sanction to the principles already stated, that we should hold that the judge below erred in refusing to give the third instruction asked, and in telling the jury, in lieu of the charge asked,—1. "It must appear, from the testimony, that the imprisonment of the plaintiff by the defendant, and the carelessness or neglect of the defendant or its agents, in providing sufficient bed-clothing, or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he had sustained." 2. "If the injury sustained by the plaintiff resulted from the carelessness of the defendant or its officers, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as compensation," etc.

Acting under the instruction given, it may be that the jury believed, from the evidence, that the sickness and suffering of the plaintiff was caused by the failure of the keeper of the prison to make a fire in a stove, though he had an abundance of fuel provided by the proper authorities of the city. The case of *Lewis v. City of Raleigh*, *supra*, was one in which the plaintiff was arrested for a violation of a city ordinance, which is made, by section 3820 of the code, a criminal offense, and therefore it is very similar to this. But it is distinguishable in that the plaintiff Lewis was confined in a narrow cell, eight by fourteen, located in a cellar under the market-house, with no window, and no ventilation except a grate in the door that opened on an underground passage, with a window at one end, lighted through a grate on the sidewalk. Reviewing the admitted facts, Justice Reade, for the court, said: "It was an impossibility that such a place could 'secure health and comfort,' in the language of the constitution, or that it could be 'clean,' in the language of the statute." On the trial below, there was a great deal of testimony tending to show

that the prison of the defendant was well constructed for health and comfort, and was provided with bed-clothing, fuel, stoves, and every necessary to secure a reasonable degree of comfort, and protect health. Counsel on the argument cited *Bunch v. Edenton*, 90 N. C. 431, in support of the contention that the evidence established the accountability of the defendant. The plaintiff there brought his action to recover damages for an injury caused by his falling into an excavation near the sidewalk in the town of Edenton. Justice Merrimon, in delivering the opinion of the court, adverted to the distinction we have drawn between the corporate and governmental powers of a town, and cited *Lewis v. Raleigh* and *Hill v. Charlotte, supra*. The law required that the commissioners "shall provide for keeping in proper repair the streets and bridges in the town": Code, sec. 3803. The court, construing the law, said: "And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous places and things very near, shall be guarded against by proper railings and barriers."

It is not necessary that we should pass upon the exception to the evidence of Dr. Reagan, who testified as an expert, yet we would suggest a careful examination of the rule laid down in *State v. Bowman*, 78 N. C. 509, in framing questions for the witness in any future trial.

For the error pointed out in the charge to the jury, the defendant is entitled to a new trial.

COUNTIES ARE NOT LIABLE to a private action at the suit of a party injured by a neglect of the county's officers to perform a corporate duty, unless such right of action is expressly given by statute: *Downing v. Mason Co.*, 87 Ky. 208; 12 Am. St. Rep. 473, and note 476; nor is a municipality answerable for personal injuries resulting to parties from the negligence of its officers: *Chope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 113, and note 114, 115; but a city is liable for such injuries resulting from the negligence of its authorized agents when they are engaged in making improvements which the city has general authority to make: *Wetter v. St. Paul*, 40 Minn. 460; 12 Am. St. Rep. 752, and note 753, 754; *Village of Jefferson v. Chapman*, 127 Ill. 438; 11 Am. St. Rep. 136.

A MUNICIPALITY IS NOT LIABLE IN DAMAGES to a person who was confined in a city prison upon a conviction for disturbing the peace of the city, and who sustained injuries by reason of the bad condition of such prison, or the negligence of the officer in charge thereof: *La Clef v. City of Concordia*, 41 Kan. 323; 13 Am. St. Rep. 285.

STATE v. POWELL.

[108 NORTH CAROLINA, 424.]

CRIMINAL LAW — LARCENY. — WHILE SECRECY IS THE USUAL EVIDENCE of the felonious intent in larceny, still it is not the only manner in which it may be committed; for if defendant knowingly took the goods of another, making no pretense of any claim or right to them, with intent to wholly deprive the owner of them, and to appropriate them to his own use, he is guilty of larceny.

LARCENY — EVIDENCE OF FELONIOUS INTENT. — Where the prosecuting witness dropped some money, which the defendant picked up, and when it was demanded said, "Oh, hell! you ain't going to get this money," and when the prosecutor started in pursuit of him in an attempt to regain possession of the money, he walked off with it, putting his hand to his breast and threatening to kill the prosecutor if he attempted to follow, — these circumstances afford strong evidence of a felonious intent in the mind of defendant, and they should be submitted to the jury to enable them to determine whether the taking constitutes larceny.

INDICTMENT FOR LARCENY may allege the ownership of the property stolen as being in a bailee.

LARCENY. The prosecuting witness, Whitaker, had in his possession considerable money, part of which was his, and part of which belonged to a Mrs. Coker. At the time of the alleged larceny he was traveling in company with one Bailey, and on stopping to count his money he dropped part of it, which was picked up by the accused under the circumstances stated in the opinion. The accused and Bailey were jointly indicted for larceny. The accused pleaded not guilty but was convicted, and Bailey was not tried.

Theodore F. Davidson, attorney-general, for the state.

SHEPHERD, J. The defendant contends that he is not guilty, because "there was no artifice to conceal the fact that he had gotten the money in his possession; that there was no effort to conceal the fact of the taking, and that the prosecutor knew who had his money, and against whom to bring his action."

For these positions he relies upon *State v. Deal*, 64 N. C. 270, and *State v. Sows*, Phill. (N. C.) 151. The proposition is, that there can be no felonious intent where the taking is done openly and there is no effort to conceal.

State v. Deal, supra, is a leading case in this state upon the subject of felonious intent in larceny, and while the conclusion reached by the court is generally regarded as correct, much that is said in the opinion has been questioned, and the doubts which have arisen have been greatly strengthened by the

forcible dissenting opinion of Mr. Justice Rodman. It will be observed that, in addition to there being no effort to conceal in that case, there was another element which was sufficient to have entitled the defendant to a new trial; that was, as the learned chief justice says, "a seeming excuse for the artifice by which he (Deal) got possession of the note. . . . The defendant alleged that the title to the land for which he had executed his note was not good, for that it was subject to a dower right; and being dissatisfied with this state of things, he resorted to a trick to get hold of the note, for the purpose of canceling it." The trial judge did not submit this view to the jury, and the defendant was thus deprived of the "seeming excuse" for his conduct.

We think that this view of the case had much to do with the decision of the court, and in this we are sustained by 2 Wharton's Criminal Law, sec. 1787, where the author, speaking of *State v. Deal, supra*, says: "It was held that this was not larceny, larceny implying stealth, and this being a forcible taking under color of right."

We shall not attempt to "run and mark" the shadowy line between trespass and larceny, but we cannot yield our assent to the inference drawn by the defendant from the language of the opinion, that there can be no case of larceny unless there is an effort to conceal on the part of the offender.

The language quoted in the opinion from Judge Henderson has never passed into judicial decision, and we have been unable to find in our edition of Foster, cited in *State v. Souls, supra*, anything in support of the doctrine that the taking must be done in such "a manner as to show an intent to defraud the owner, by concealing from him who took it, so that he shall not know what has become of his property, and against whom to bring his action to recover it."

As far as our investigations have extended, we have found no such criterion laid down in any of the books. True, Mr. Wharton, in his Criminal Law, volume 3, section 1876, states that where the taking is openly done, it is but a trespass, and perhaps similar expressions may be found in other modern works, but upon reference to the notes it will be seen that they are based upon Hale (P. C. 509), where it is said that if the taking is done openly it "carries with it an evidence only of a trespass"; but these authors fail to add the following language of Lord Hale, used in the same connection: "But in cases of larceny the variety of circumstances is so great, and the com-

plications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent or the contrary, but the same must be left to the due and attentive consideration of the judge and jury; wherein the rule is, *in dubiis*, rather to incline to an acquittal than conviction." From which it seems, says Judge Rodman, "that Lord Hale did not think an open manner of taking inconsistent with larceny, but only a circumstance from which the jury might infer an absence of felonious intent."

We fully concur with the chief justice and Judge Henderson, that a prominent feature of larceny is, "that the act be done in a way showing an intent to evade the law, that is, not to let the owner know who took the property," etc.; but we cannot agree that this is the only way the felonious intent may be manifested in larceny, any more than that concealment, as the chief justice suggests, is necessary in robbery. It is true, as Blackstone says (vol. 4, p. 232), that "the ordinary discovery of a felonious intent is where the party doth it clandestinely, or, being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animus furandi*; wherefore they must be left to the due and attentive consideration of the court and jury." To the same effect is that accurate and discriminating writer, Mr. Chitty, who, in his volume 3 on Criminal Law, page 927, says that "the openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention: 1 Hale P. C. 507; 2 East P. C. 661, 662; but this alone will not make it the less a felony: Kelyng, 82; 2 Ld. Raym. 276; 2 Vent. 94." On page 926, he says: "Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on circumstantial evidence, and to be left for the jury's decision." East (2 P. C. 662), after speaking of the evidences of a felonious intent, says: "And the circumstances of the party's offering the full value or more at the time ought to be left to them [the jury] to show that his intention was not fraudulent, and so not felonious; for it does not necessarily follow, as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent is, therefore, not

felonious, though it is, I apprehend, pregnant evidence of the negative." 3 Greenl. Ev., sec. 157, sustains the view that the mere fact of the taking being without concealment is evidence which should be left to the jury. He says that it "would be pregnant evidence to the jury that the taking was without a felonious intent."

In *Vaughn v. Commonwealth*, 10 Gratt. 758, the defendant was held guilty of larceny of his bond, under circumstances similar to those in *State v. Deal*, *supra*. Moncure, J., dissented, on the ground that the bond was given for land; that there was a controversy about the boundaries, etc.; and that this, in connection with the open manner in which it was taken, showed that there was no felonious intent. He expressly admits that concealment is unnecessary. It is true, he says, "that secrecy, though a usual, is not a necessary, attendant of larceny, which may be, and sometimes is, committed openly." None of the definitions of larceny require that the taking be done secretly.

It must be done, says Foster, 124, with a wicked, fraudulent intention, which is the "ancient known definition of larceny: *Fraudulenta obtrectatio rei alienæ invito domino*."

Lord Hale (P. C. 508) says: "As it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi*; otherwise, it is not felony, for it is the mind that makes the taking of another's goods to be a felony or a bare trespass only; but because the intention and mind are secret, the intention must be judged by the circumstances of the fact."

"The felonious attempt, or *animus furandi*, means an intent fraudulently to appropriate the goods. Whether the intent existed or not, is entirely a question for the jury, which, as in all other cases of intent, they must all infer from the words or acts of the defendant, or the nature of the transaction": 2 Archbold's Criminal Practice and Pleading, 6th ed., 366.

In his Pleading and Evidence (3d Am. ed., 173), Archbold thus defines the felonious intent: "But larceny, as far as respects the intent with which it is committed, . . . may, perhaps, correctly be defined thus: Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use."

These authorities, we think, conclusively establish that while secrecy is the usual evidence of the felonious intent,

it is by no means the only manner in which it may be proved.

In our case, every ingredient of Mr. Archbold's definition is present. The defendant knowingly took the goods of another, and he made no pretense whatever of any claim or right to them.

It is shown, as clearly as any fact can be shown, that he intended to wholly deprive the owner of them, and to appropriate them to his own use. And yet it is insisted that because he showed such a reckless disregard of the consequences of his outrageous act, he could not, as a matter of law, have a fraudulent or felonious intent.

The defendant, according to the testimony of the state, "catches up" the money of the prosecutor. When it is demanded, he says to the prosecutor, "Oh, hell! you ain't going to get this money." His companion holds the prosecutor when he attempts to regain the possession. The defendant walks off with the money, and when finally the prosecutor releases himself, and starts in pursuit, the defendant puts his hand to his breast, "and threatens to kill him if he continues to follow."

We think these circumstances afford strong evidence that there existed in the mind of the defendant a fraudulent and felonious intent.

Such open taking, where there is neither force nor stratagem, is very unusual, and, as we have seen, is a "pregnant" circumstance in favor of the non-existence of the felonious intent. Strong evidence, therefore, is necessary to sustain a conviction in such case. The circumstances deposed to by the prosecutor clearly pointed to the existence of a felonious intent, and we cannot but think that, if the facts of this case had been presented to the late distinguished chief justice, he would have unhesitatingly sustained his honor in submitting them to the jury.

The principles we have declared dispose of exceptions 1, 2, 3, and 6. Exception 4 is without merit. The prosecutor, it appears, was the bailee of Mrs. Coker, and therefore had a special property in the money: See *State v. Allen*, decided at this term, and the authorities cited.

We are unable to see how the rights of the defendant were injuriously affected by the count against Bailey. It seems that he was not tried with this defendant, and there is noth-

ing in the record to suggest that the defendant was in any way prejudiced.

Affirmed.

LARCENY. — A strong presumption arises, on a prosecution for larceny that there was no felonious intent, if the taking was open and notorious, and there is no subsequent attempt to conceal the property; but this presumption may be repelled by clear and convincing proof of felonious intent: *Black v. State*, 83 Ala. 81; 3 Am. St. Rep. 691. But unless the taking be *animo furandi*, there can be no larceny: *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875; *Harris v. State*, 81 Ga. 758; 12 Am. St. Rep. 355, and note.

LARCENY, INDICTMENT FOR. — An indictment for larceny must aver that the property stolen belonged to some person other than the accused: *People v. Hanselman*, 76 Cal. 460; 9 Am. St. Rep. 238; but under the Oregon statute, an indictment for taking money by force from the person of another need not allege property ownership in some person other than defendant: *State v. Dilley*, 15 Or. 70. An indictment for larceny may be valid, although it alleges ownership of the stolen property to be in a bailee: Note to *People v. Hanselman*, 9 Am. St. Rep. 242.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

MORRISON v. COLLINS.

[127 PENNSYLVANIA STATE, 28.]

NEGOTIABLE INSTRUMENTS. — PRESUMPTION OF PAYMENT OF NOTE UNDER SEAL does not arise until twenty years have elapsed from the time it matured; and the circumstance that the maker was able to pay will not rebut such presumption.

NEGOTIABLE INSTRUMENTS — PAYMENT OF NOTE. — PRESUMPTION THAT NOTE UNDER SEAL has not been paid until the expiration of twenty years from the time of its maturity can only be rebutted by proof of facts which would justify the jury in finding the fact of payment within twenty years. Thus proof that the holder had been constantly pressed for money, while the maker was abundantly able to pay, may justify the finding of payment within such time.

NEGOTIABLE INSTRUMENTS — PRESUMPTION AS TO PAYMENT OF NOTE — BURDEN OF PROOF. — It is presumed that a note under seal has not been paid until the expiration of twenty years from its maturity; and the burden of proof is upon the maker to show payment within twenty years, or facts from which the jury may properly infer payment.

ASSUMPSIT brought on July 9, 1887, on a note under seal, for two hundred dollars, executed and due on March 4, 1871. At the trial below, after the note had been admitted in evidence, a witness testified that he was employed by the maker and payee of the note after 1876; that the parties to the note were in business together from 1870 to 1878, and that in 1877 the witness made out a statement of old accounts between the parties, leaving a balance of \$200 or \$250 in favor of the maker of the note; that the payee therein told the maker to put the matter of settlement off, and that any time would do to settle up these old matters. An offer was then made to show by this

witness that for several years after the maturity of the note the maker had an abundance of property and means to pay it, or from which payment could have been compelled. This evidence was objected to as incompetent, and the objection sustained, and an exception noted. Verdict and judgment for \$410, and defendant prosecutes his writ of error.

D. I. Ball and C. C. Thompson, for the plaintiff in error.

W. E. Rice, R. Brown, C. W. Stone, and H. E. Brown, for the defendants in error.

By COURT. The note in controversy was under seal. In such case, the presumption of payment does not arise until twenty years have elapsed. At least this is the general rule. There are cases which intimate that a presumption of payment may arise in less than twenty years; that is to say, there may be such circumstances surrounding a case as would justify a jury in finding the fact of payment within the twenty years. Thus if it be proved that the holder of the note has been constantly pressed for money, while the maker was abundantly able to pay, such fact, with other circumstances, might justify the presumption of payment. The single circumstance that the defendant was able to pay would not be a fact from which this presumption would arise in less than twenty years. For if the defendant is able to pay, the plaintiff may be able and willing to wait, and within the twenty years the burden is upon the defendant to prove payment, or such facts or circumstances from which the jury may properly infer payment. An examination of the case shows that the rulings of the learned judge below were quite as favorable to the defendant as he had any right to expect.

Judgment affirmed.

PRESUMPTION THAT A DEBT IS PAID after the lapse of twenty years is a disputable one: *Barker v. Jones*, 62 N. H. 497; 13 Am. St. Rep. 586; *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. St. Rep. 804, and note.

PRESUMPTION OF PAYMENT never arises from lapse of time short of the period fixed by law: *Adair v. Adair*, 5 Mich. 204; 71 Am. Dec. 779; *Smith-peter v. Ison*, 4 Rich. 203; 53 Am. Dec. 732, and note 734, 735; see also note to *Husky v. Maples*, 88 Am. Dec. 590, 591.

PRESUMPTION AS TO PAYMENT OF NOTE. — Where a note was payable in 1872, upon which action was not brought till 1886, but payments were made as late as 1879, and the makers in the mean time, failing in business, compromised with their creditors, the lapse of time did not raise a presumption that the note had been paid: *Walker v. Russell*, 73 Iowa, 340.

ALLEN v. FIRST NATIONAL BANK.

[127 PENNSYLVANIA STATE, 51.]

NEGOTIABLE INSTRUMENTS — LIABILITY OF ACCOMMODATION MAKER OF NOTE. — The cashier of a national bank, who is a debtor of the bank, and who procures the making or indorsing of a note for his own accommodation, cannot make an agreement binding upon the bank that there shall be no liability upon the note. Such agreement is beyond his powers as cashier, and consequently the bank is not bound.

NEGOTIABLE INSTRUMENTS — LIABILITY OF ACCOMMODATION MAKER OF NOTE. — An accommodation maker of a note which has been discounted by a bank cannot defend payment on the ground that the bank in discounting it loaned in excess of the legal limit of one tenth of its capital.

ASSUMPSIT on a note given November 5, 1886, by O. C. Allen, for five thousand dollars, payable at three months at the First National Bank of Warren, to the order of Beecher and Copeland, and by them indorsed. Plea, *non assumpsit*. At the trial below the note was admitted in evidence, when it was proposed to prove by Allen that at the time the note was executed, Beecher, who was cashier of the bank mentioned, called on him and stated that said bank was carrying for the firm mentioned a number of oil certificates, exceeding in value the amount allowed by law, and that the bank wanted these certificates divided among other parties, or carried by other persons, so as to make an appearance of compliance with the law, and thus deceive the bank examiner, and hide the bank's violation of the United States law; for that purpose he asked the witness to make a note for five thousand dollars, to be secured by five thousand barrels of the oil carried by the bank for Beecher and Copeland; witness executed such note without other consideration, and delivered it to Beecher, who placed it in the bank with the oil certificates as its collateral security, with the express agreement that the witness should not be liable on the note; that the note in suit was the second or third renewal of the one given, and that each renewal was made under the same conditions and considerations as the one first given. All this evidence to be followed by other proof of like nature and in substantiation of that now offered. This offer was objected to, on the ground that the proposed proof did not show any authority on the part of the cashier to make such an agreement so as to bind the bank, that the proposed evidence afforded no legal defense to the note, and that if given it would tend to defeat a written contract by parol. Objection sustained and exceptions noted. Verdict and judgment

for plaintiff for \$5,580.83, and defendant appeals by writ of error.

Charles Dinsmoor, W. W. Wilbur, and George H. Higgins, for the plaintiff in error.

Charles H. Noyes, W. D. Hinckley, R. Brown, Charles W. Stone, and W. E. Rice, for the defendant in error.

PAXSON, C. J. We think the offers of evidence in this case were properly rejected. Assuming all the facts covered by the offers to have been proved, they would not have amounted to a defense as against the bank. The whole confusion in the case grows out of the fact that the Mr. Beecher mentioned in the offer was at the same time a member of the firm of Beecher and Copeland, and cashier of the First National Bank of Warren, plaintiff below. The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant below at the post-office can only be taken as an effort on his part to procure accommodation paper to the amount of five thousand dollars, to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expected soon, and it became necessary for defendant's firm to retire some of its paper. It was equally necessary, perhaps, for the bank; and the defendant, as its cashier, must have been fully aware of the importance of getting the accounts of his own firm in proper condition. He succeeded in procuring from the defendant his note for five thousand dollars, to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it. Had he given such assurance in writing it would not have made any difference, as the note was evidently for the accommodation of his firm, and it was as much the duty of the latter to protect it as if a stipulation had been made to that effect in writing. This is all that the offer of evidence amounts to. There is not a word to implicate the bank in any matter except that it had allowed defendant's firm to exceed its lawful line of discount. There was no offer to show that the bank did anything, either by its board of directors or its officers, acting within the scope of their official duties, or by virtue of an express or implied authority from

the bank. Nor was there any error in rejecting the offer to show that the bank had discounted paper for Beecher and Copeland for an amount of more than one tenth part of its capital. This was no concern of the defendant. That it was no defense to the note is shown by *O'Hare v. Second National Bank of Titusville*, 77 Pa. St. 96, and *Mapes v. Second National Bank of Titusville*, 80 Id. 163. There is nothing to show, nor was there any offer to prove, that the plaintiff bank knowingly and willfully made this loan in excess of the legal limit. Such a matter may often occur by mistake; and when it does, it is perfectly proper to correct it. We see no error in affirming the plaintiff's point. The allegation of usury was not sustained by the evidence, and as there was no defense to the note, it was not error in the learned judge to direct a verdict for the plaintiff. The view we take of the case renders a discussion of the authorities cited unnecessary. They have no application.

Judgment affirmed

ACCOMMODATION NOTES. — An accommodation note has no validity until it is discounted or passes into the hands of a holder for value; and until negotiated, the maker can withdraw from the contract: *Second National Bank v. Howe*, 40 Minn. 390; 12 Am. St. Rep. 744. Where a bill is drawn and indorsed for accommodation of the acceptors upon the condition that they discount it at a particular bank, a purchaser before maturity, without notice of the secret agreement, can recover the amount of the bill against the drawers: *Frank v. Quast*, 86 Ky. 649. It is no defense to a note that the maker signed it at the request of one for whose accommodation it does not appear to have been given, under his promise, express or implied, to indemnify the maker: *Lockwood v. Twitchell*, 146 Mass. 623.

BANKS. — The fact that a bank made a loan of money in excess of the amount limited by law does not defeat the right of the bank to collect such loan: *Mills County National Bank v. Perry*, 72 Iowa, 15; 2 Am. St. Rep. 228.

RICE v. RICE.

[127 PENNSYLVANIA STATE, 131.]

EVIDENCE. — **INTENTIONS OF ALLEGED LUNATIC WHEN HIS SANITY WAS UNQUESTIONABLE** are competent evidence for the consideration of the jury, in a case wherein his will or deed is sought to be avoided on account of his want of capacity to execute it.

EVIDENCE — DECLARATIONS — EVIDENCE OF INSANITY. — Declarations made by a grantor not more than fifteen months before a finding of insanity against him, nor more than eighteen months before the execution of the disputed deed, that he intended to execute "this conveyance" or "a deed" to defendants, are not so remote as to be inadmissible in their favor when they are sued in ejectment; nor does it affect the admissibility of such declarations that there is a variance between them and what the grantor subsequently did.

EXECUTMENT by John Rice against D. E. Rice, Jr. Judgment for plaintiffs. Defendants assign error.

B. F. Davis and J. Hay Brown, for the plaintiffs in error.

H. M. North and W. M. Franklin, for the defendants in error.

MITCHELL, J. This case is clearly ruled by *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648. In regard to the competency of evidence as to the sanity of the maker, there is no difference in principle between a will and a deed, and the authorities have not admitted any.

The case of *Irish v. Smith*, *supra*, arose upon a contest as to a will, but the reasoning of Chief Justice Tilghman is equally applicable to the case of a deed: "The will of 1814 was impeached on two grounds: 1. For incapacity of the testator; 2. Because it was obtained by fraud and improper management. In both points of view, it was proper for the jury to be informed what had been the testator's intentions when his understanding was unquestionable." And in *Wilkinson v. Pearson*, 23 Pa. St. 117, similar declarations were admitted in a contest as to the sanity of the grantor in a deed, and Knox, J., put the admissibility expressly upon the principles of *Irish v. Smith*, *supra*. In *Chess v. Chess*, 1 Penr. & W. 32, 21 Am. Dec. 350, the same principle was applied to the much more doubtful case of declarations made subsequently to the execution of the deed, the court holding, on the authority of *Irish v. Smith*, *supra*, that the evidence was competent on the question of sanity.

The declarations offered in the present case seem to have been excluded partly on the ground that they were too remote in time, though what period of time the court fixed is not clearly discoverable from the evidence printed in the paper book. It may be doubted if any limit of time can be absolutely fixed in regard to declarations admitted for the purpose in question, though of course the more remote they are the less weight they will properly be entitled to.

The finding of the inquisition dated the insanity of Rice from the stroke of paralysis in April, 1882, and the deed in controversy was made in July of the same year. The declarations offered were made in 1881 and the early part of 1882. None of them, therefore, was more than fifteen months before the alleged insanity began, or more than eighteen months before the disputed deed. They certainly were not too remote.

In *Wilkinson v. Pearson*, *supra*, the interval was more than two years, but no question seems to have been raised on that ground.

Nor is the variance between the declarations offered and what Rice subsequently in fact did of any weight. The first offer was of "an intention to execute this conveyance," and was not open even to this argument. The others were of an intention to execute "a deed." There was not, therefore, any real variance at all. But even if the declared intention had been to make a gift, as it seems to have been regarded by counsel, it would have been an altogether immaterial variance, as the fact that a grantor made a better bargain for himself than he had declared his intention to do when unquestionably sane, was certainly some proof of his competency to know what he was doing when he did make the grant.

The rejection of this evidence was therefore erroneous.

Judgment reversed, and *venire de novo* awarded.

DECLARATIONS OF THE TESTATOR are admissible as to his mental condition, when the question is as to his capacity to make a will: Note to *Waterman v. Whitney*, 62 Am. Dec. 81. Evidence of a testator's mental and physical condition before making a will is admissible as throwing light on his condition at the time of its execution: *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282. Compare *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489.

TOWNSHIP OF JACKSON v. WAGNER.

[127 PENNSYLVANIA STATE, 184.]

HIGHWAYS. — TOWNSHIP OFFICERS ARE ONLY BOUND TO ANTICIPATE and provide against the ordinary needs of travel conducted in the ordinary manner on ordinary country roads, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along such highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate unusual dangers or obstructions to which a broken wagon or a frightened horse may expose the driver.

HIGHWAYS. — LIABILITY OF TOWNSHIP FOR AN ACCIDENT HAPPENING ON A HIGHWAY DOES NOT EXIST if the road was at that time and place in a condition which made it suitable and sufficient for public travel conducted in the ordinary manner. It is not sufficient for the plaintiff to show that injuries resulted to him from the combined effect of the condition of the road and of a succession of accidents which there befell him.

W. M. Derr, for the plaintiff in error.

Grant Weidman and P. S. Keyser, for the defendant in error.

WILLIAMS, J. This case presents an unusual question, one that is not clearly settled, and one of much more than ordinary importance. The facts upon which it is raised are not involved in any serious controversy. The plaintiff was driving a horse and wagon along a public highway in Jackson township, Lebanon County. Her sister and three children were in the wagon with her. At one point there was at the side of the road an irregular pile of stones some twenty-five feet long and from one to two feet high, which had been taken out of the road in the immediate vicinity by the supervisors, and left there until a convenient time for their removal. Between the stone pile and the gutter opposite was an unobstructed roadway fifteen feet wide. The plaintiff drove over this part of the road without noticing that there was a stone pile near the road or any defect in the roadway. When about one hundred and twenty feet beyond the stone pile, her horse took fright at two donkeys approaching in the road, stopped, turned suddenly around, broke down the left forward wheel, and let the axle fall to the ground. It then started rapidly back, drawing the buggy on three wheels and the dragging axle. The axle acted like a rudder in drawing the horse and wagon to the north side of the road, until, when the stone heap was reached, the axle struck it, the wagon was overturned, and the plaintiff injured. She testifies that at the same time the hind wheel dropped into a depression in the road, which aided in overturning the wagon. A recovery was sought and had in the court below, on the theory that it was negligence in the supervisors to leave the stone pile where it was, and to suffer the depression in the roadway to remain for several days unfilled.

The defense alleged that the road was in good condition, safe for all the ordinary purposes of travel, and that plaintiff's injury was chargeable to the fright of her horse, the breaking of her wagon, and her consequent inability to guide or control the horse, and keep it within the limits of the traveled roadway. These, it was urged, were circumstances that the township was not bound to anticipate or provide against, and the injury received by means of them was one which was in no sense the natural or probable cause of the acts complained of. This line of defense was presented to the court in the defendant's points, the third of which asked the following instruction:—

“If the jury believe that the horse was frightened by the

donkey, and in turning round broke the wheel of the buggy, and on account of this broken wheel, that side of the front part of the buggy-axle was on the ground, and prevented the driver from guiding the horse to the right in order to avoid the stone heap, or if they believe that the driver had lost control of the horse, then the plaintiff cannot recover."

In other words, this was a request for an instruction that if the injury received was due to the fright of the horse, the broken wheel, and the dragging axle, and not to a defect in the highway, the township was not liable. This should have been affirmed, with some qualification as to the effect of mere loss of control by the driver; for if the several facts assumed by the point had been found by the jury, the plaintiff was not entitled to a verdict.

Township officers are bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along the highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate the danger to which a broken wagon or a frightened horse may expose the driver. Such a burden would be too heavy for any township to bear, and the law does not impose it. The general rule is well stated in *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733, to be that "roads and bridges are made for ordinary travel; if they fulfill such purpose, they are sufficient, and those in charge of them are not responsible for extraordinary accidents occurring on them." Negligence is the absence of that measure of care which the circumstances require. The duty of road officers is to provide for the ordinary needs of travel, but this changes with a change of circumstances. Proximity to a precipice or a railroad track is a visible danger, and requires a degree of care in guarding against it not necessary under ordinary circumstances; yet it is only that care which common prudence would dictate, in view of an unusual danger, as necessary to safety in the ordinary use of the highway at that point: *Lower Macungie Tp. v. Merkhoffer*, 71 Pa. St. 276; *Hey v. Philadelphia*, *supra*; *Newlin Tp. v. Davis*, 77 Pa. St. 317.

The application of this rule to the case in hand is by no means difficult. The road in question is an ordinary country road, passing through an open, cultivated region, with no unusual dangers or exposures. It was fifteen feet wide at the

place where the accident occurred. The testimony tended to show that it was in ordinary repair, and safe for the purposes of ordinary travel. It is true, there would have been from four to six feet more space over which a horse and wagon could pass if the stone pile had not been there, and it may be conjectured that such additional space would have enabled the plaintiff to pass this particular spot safely; but this alone is not enough to settle the defendant's liability. The question is, whether this road was obstructed so as to interfere with its ordinary use, and whether such obstruction caused the injuries. The horse had passed this part of the road without the slightest inconvenience. There was no railroad crossing, no precipice, or other exposure, but the fright of the horse was at an object for whose presence in the highway the township was not responsible. The wheel was crushed by the sharp turn of the wagon, not by any defect in the highway. The dragging axle drew horse and wagon to one side of the road, so that the axle struck the stone pile, and the wagon was overturned, and the plaintiff hurt. Now, the question is, not whether a broader road would have enabled the plaintiff to pass along safely with her frightened horse and disabled wagon, but whether the road was broad enough and good enough for the purposes of a highway in that place. Was it safe for the purposes for which it was made? and did it accommodate the traveling public, using it in the ordinary manner, with reasonable facilities for travel?

That an accident did happen is clear, but that fact alone does not settle our question. It is necessary to inquire, further, whether the accident was the natural or probable result of any act or omission of the township officers which rendered the highway unsafe for the purposes of travel, conducted in the ordinary manner and by the ordinary means of conveyance. If it was, then the plaintiff ought to recover; and the fright of her horse, the breaking of her wagon, and her inability to guide her frightened animal should not stand in the way of her recovery. These circumstances do not confer on her any rights she would not have possessed without them, nor give her any higher claim on the care of the township officers. On the other hand, they do not take from her any right to which she, in common with other travelers, was entitled in the use of the highway. It is the condition of the highway, therefore, and not the succession of accidents that befell the plaintiff, to which the attention of the jury should

have been held. Was the road, on that day and at that place, in a condition that made it a suitable and sufficient road for public travel conducted in the ordinary manner? If the jury had found, as the third point assumed, that the plaintiff's injury was not due to an unsafe condition of the road, but to the successive accidents which befell her, and which had no connection whatever with the road, or with the doings or misdoings of the supervisors, then it is very clear that the township was not liable to pay her. If the jury had found against the township on the facts assumed, and that her injury was due to the existence of defects in the road which the exercise of common prudence would have required the removal of, for the safety of travelers using the public road in the ordinary way, then she would have been entitled to a verdict.

Judgment reversed, and *venire facias de novo* awarded.

HIGHWAYS. — The law does not impose upon township officers absolute liability for every insufficiency of a road, but they are required to do what is practicable to preserve a condition of reasonable safety with reference to the amount and kind of travel: *North Manheim Township v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650. As to the obligation resting upon a township to keep its highways in good repair: *Burrell Township v. Uncapher*, 117 Pa. St. 353; 2 Am. St. Rep. 664, and note 668; *Township of Plymouth v. Graver*, 125 Pa. St. 24; 11 Am. St. Rep. 867, and note. Where a township maintains a certain kind of bridge on its highway, it is bound to use the care necessary to keep such a bridge in repair: *Stebbins v. Township of Keene*, 60 Mich. 214. Where a bridge on a public highway is half in one township and half in another, each township is liable to travelers for injuries received without their fault, in consequence of the negligence on the part of such township to keep its half of the bridge in good repair: *Sharp v. Township of Evergreen*, 67 Id. 443.

McCORMICK v. McELLIGOTT.

[127 PENNSYLVANIA STATE, 280.]

WILLS — CONSTRUCTION OF WORDS “DYING WITHOUT CHILDREN.” — Where a testator, after giving all his estate to his wife for life, and creating a trust of five thousand dollars, to take effect at her death, in favor of his son for life, then bequeaths “the rest, residue, and remainder” of his estate remaining after the death of his widow to his “daughter Hannah, her heirs and assigns,” and if the latter “should die without child or children,” then his estate to be equally divided between his brother and sisters, an indefeasible estate in fee is created in the daughter if she survives her mother, as the words “should die without child or children” evidently mean die without child or children during the lifetime of the testator's widow.

William R. Brinton, for the plaintiff in error.

Atlee and Coyle, for the defendant in error.

By COURT. Notwithstanding the able and ingenious argument of the learned counsel for plaintiff in error, we are not convinced that the will of Jeremiah McElligott was erroneously construed by the court below.

After giving all his estate, real, personal, and mixed, to his wife for life, and creating a trust, as to five thousand dollars, to take effect at her death in favor of his son Thomas for life, etc., the testator devised and bequeathed "the rest, residue, and remainder" of his estate remaining after the death of his widow to his "daughter Hannah, her heirs and assigns." In the next clause of the will, he orders and directs, in case his "said daughter Hannah should die without child or children," that his estate be equally divided between his brother and sisters. The devisee, Hannah McElligott, having come into possession of the residuary estate after the death of her mother, contracted to sell and convey a portion thereof in fee to defendant below. She accordingly executed and tendered him a deed in due form for the lot referred to in the case stated; but he refused to accept it and pay the consideration money, on the ground that, under the provisions of the will, she was not seised of an indefeasible estate of inheritance, and was therefore unable to convey such title as he had a right to demand. The learned judge of the common pleas, however, held that the testator intended to give his daughter Hannah an absolute estate in fee-simple in the property devised to her, provided she survived her mother, to whom he had given a life estate therein; that, being so seised of an indefeasible estate, her deed to defendant below would, under the facts embodied in the case stated, give him a good title in fee, clear of all encumbrances; and he therefore entered judgment on the case stated in her favor. In this we think he was clearly right, for reasons given at length in his opinion sent up with the record. The words "should die without child or children" were evidently intended to mean die without child or children during the lifetime of testator's widow. This construction accords with the weight of authority. Neither of the specifications of error is sustained.

Judgment affirmed.

WILLS. — Construction of the words "dying without issue": *Stevenson v. Fox*, 125 Pa. St. 568; 11 Am. St. Rep. 922, and particularly cases cited in note 924.

HEFT v. OGLE.

[127 PENNSYLVANIA STATE, 244.]

WITNESSES — COMPETENCY OF LEGATEE. — In an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment, or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit.

WITNESSES — COMPETENCY. — A person who has merely an incidental interest in the result of a suit, such as arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest at any time before he offers himself as a witness, and if he does so, his evidence is not inadmissible on the ground of interest.

George Junkin and Joseph De F. Junkin, for the plaintiff in error.

A. T. Freedley and William Henry Rawle, for the defendant in error.

STERRETT, J. This suit was brought by Frank E. Ogle, administrator of Mary F. Ogle, deceased, against Jacob D. Heft, who survived Harry S. Ogle, late partners as Heft and Ogle, to recover money alleged to have been loaned to said firm by plaintiff's intestate, Mary F. Ogle, who died leaving, as her only heirs at law, four children, viz., Maria S., Harry S. (deceased member of Heft and Ogle), Frank E. (the administrator), and Caroline Ogle.

On the trial, plaintiff below called his sister, Maria S. Ogle, to substantiate the claim in suit. The witness being objected to as incompetent, he proved and put in evidence a paper, signed and sealed by her, wherein she absolutely releases, assigns, and transfers to her brother, Frank E. Ogle, individually, all her "right, title, and interest of whatsoever kind, either in law or equity, of, in, and to any sum or sums of money which may be recovered or which may result from" this suit, and discharges "him from all liability or accountability, . . . in any form whatever, for any sum or sums of money which may be recovered in said action." The witness also testified, on her *voir dire*, that there was no other agreement between herself and her brother, and that she then had no interest in the fund. The objection was overruled, and bill sealed for defendant below.

The question thus presented in the first specification is, whether the learned judge erred in ruling as he did. We are

of opinion that he did not. The witness was not a party to the record. She was neither the owner nor the assignor of the claim in suit; nor could she individually, in her own right, ever have been plaintiff in an action to recover the same. She was not a party in interest, because, prior to suit brought, she absolutely released and transferred to her brother, individually, all the interest she ever had or could have in the amount that might be recovered. She was therefore competent to testify, and no policy of law excluded her. On the contrary, the policy of the law is rather to favor the admission of witnesses who are divested of all interest. Whenever it is practicable to do so, the tendency of modern legislation, as well as judicial decision, is to let questions of policy, interest, etc., go to the credibility, rather than to the competency, of witnesses.

On principle as well as authority, it ought to be considered settled that in an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment, or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit: 1 Greenl. Ev., secs. 419, 430; Miller on Witnesses, 58; *Scott v. Lloyd*, 12 Pet. 145; *Gebhart v. Shindle*, 15 Serg. & R. 235; *Dellone v. Rehmer*, 4 Watts, 9; *Commonwealth v. Ohio etc. R. R. Co.*, 1 Gratt. 348; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Carter v. Trueman*, 7 Id. 315; *Steininger v. Hoch*, 42 Id. 432; *Forrester v. Torrence*, 64 Id. 29; *Brant v. Dennison*, Pennsylvania, October 5, 1885; 1 Cent. Rep. 400.

In some of our cases there is more or less confusion of thought, arising from the failure to properly distinguish those of the class to which the one now before us belongs from cases in which the proffered witness was either actually or substantially a party to the suit, or in which he was the assignor of the thing or contract in action, a party to a negotiable instrument, or otherwise incompetent, on the ground of public policy. In *Haus v. Palmer*, 21 Pa. St. 296, *Montgomery v. Grant*, 57 Id. 243, *Grayson's Appeal*, 5 Id. 395, *Bailey v. Knapp*, 19 Id. 193, *Hatz v. Snyder*, 26 Id. 511, *Fross's Appeal*, 105 Id. 258, 266, and kindred cases, witnesses were excluded for one or other of the reasons above stated. Some of those grounds of exclusion are now greatly restricted by legislation of comparatively recent date.

In *Commonwealth v. Ohio etc. R. R. Co., supra*, Mr. Justice Black notices the distinction between an interest that is collateral and one that is direct, as follows: "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule in *Post v. Avery, supra*, applies only to persons who have assigned choses in action on which the recovery would have been for their own use, if no assignment had been made. Its object is to prevent a party from transforming himself into a witness by the magic of a bit of paper. It forbids one who assigns a claim to sell his oath along with it. But a person who has a merely incidental interest in the result, an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest, and if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock, and become a witness for the company; a legatee may dispose of his interest in the estate, and testify for the executors; an attorney who has a contingent fee may release it, and give evidence in favor of his client. The rule in question is not leveled against interested witnesses, but is founded in the policy of stopping a disinterested party from testifying in favor of one who sues in his right."

Brant v. Dennison, supra, was an action of ejectment against a mortgagor by the administrators of the mortgagee, who died intestate, unmarried, and without issue. On the trial, a niece and heir at law of the intestate, and wife of one of the administrators, was called by them to sustain the mortgage on which the action was based. Being objected to as incompetent, because she was the wife of one of the plaintiffs, and also a distributee of the estate represented in part by her husband, and therefore interested, it was shown that she had previously executed and delivered to a third party an assignment of all her interest in the mortgage in controversy; and on the authority of *Carter v. Trueman*, *Steininger v. Hoch, supra*, and kindred cases, it was held that, inasmuch as she was not a party to the suit, either actually or substantially, and her interest as distributee, so far as the claim in suit was concerned, having been divested by the assignment, she was a competent witness. In principle, that case is not essentially different from the one under consideration. The first specification of error is not sustained.

There was no error in rejecting the offer of evidence recited in the second and last specification.

Judgment affirmed.

WITNESSES — COMPETENCY OF. — An heir is a competent witness in a suit by an executor, when he has transferred all his interest in the estate: *Sylvester v. Downer*, 20 Vt. 355; 49 Am. Dec. 786; and so a devisee who releases all interest under a will is a competent witness for the trustee appointed by it: *Cook v. Grant*, 16 Serg. & R. 198; 16 Am. Dec. 564. And in an action between a brother and sister relative to the title to land which both claim from their deceased father, a brother of the claimants and his wife, who are parties to the action, but not to the issues, who disclaim any interest in the subject-matter of the controversy, are competent witnesses: *Martin v. Martin*, 118 Ind. 227. In Iowa, the code, sections 3639, does not prohibit an heir from testifying for the executor, in an action against him by another heir, where the action is not based upon any alleged hereditary rights: *Harvey v. Brown*, 76 Iowa, 179.

HINDMARCH v. HOFFMAN.

[127 PENNSYLVANIA STATE, 284.]

ASSUMPSIT FOR STOLEN MONEY. — The custodian of stolen money, who received it without knowing it to have been stolen, but who, after notice that it was stolen, and that plaintiff claimed it, paid it over on the order of the thief, is liable to the plaintiff in *assumpsit* therefor.

Theodore A. Lamb and C. L. Baker, for the plaintiff in error.

S. M. Brainerd, for the defendant in error.

STERRETT, J. This case having been submitted for trial, without a jury, according to the provisions of the act of April 22, 1874, P. L. 109, the learned president of the common pleas found the facts substantially as follows:—

On the morning of October 10, 1885, Richard Savanack stole from plaintiff, in Buffalo, New York, a large sum of money, four hundred dollars of which he afterwards, on the same day, deposited with defendant, to be returned to him or upon his order. When defendant received the money he was ignorant of the fact that it had been stolen from plaintiff by Savanack, but, while it was still in his possession and under his control, he was notified of that fact by plaintiff's attorney, and that plaintiff claimed it as his property. Notwithstanding the notice, he afterwards paid the money, "upon the order of Savanack, to Messrs. Brundage, Weaver, and Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money." Afterwards,

upon defendant's refusal to pay the amount to plaintiff, this action of *assumpsit* was brought to recover the same.

It does not appear to have been even questioned in the court below, that, upon the established facts, plaintiff had a good cause of action, but the learned judge was of opinion that he could not recover in the present form of action, and he accordingly entered judgment for defendant. His conclusions of law were duly excepted to, and they now constitute the specifications of error before us.

As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these circumstances, it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so, but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner, and there is no good reason why it should not be recovered in the present form of action.

In *Clarks v. Shee*, 1 Cowp. 197, it was held that case, for money had and received, will lie by the true owner of money against a third person into whose hands it came *mala fide*, provided its identity can be traced or ascertained. Referring to the form of action in that case, Lord Mansfield characterized it as "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action."

In 2 Greenleaf's Evidence, 13th edition, sections 102 and 120, the principle is thus stated: "Where the defendant is proven to have in his hands the money of plaintiff, which *ex equo et bono* he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and after verdict the promise is presumed to have been actually proved. . . . So if money of the plaintiff has in any other manner come to the defendant's hands,

for which he would be chargeable in tort, the plaintiff may waive the tort, and bring *assumpsit* on the common counts."

Assumpsit was also sustained in *Mason v. Waite*, 17 Mass. 558, upon the following facts: Bank notes done up in a package were delivered by the owner to a carrier, who, without authority, paid them to a third party for a loss at a faro-table. In an opinion sustaining a judgment in favor of the owner of the notes, against the party to whom they were thus paid, the chief justice, after remarking that trover would have been the better action but for the difficulty of identifying bank notes, said: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money, and as to any want of privity or any implied promise, the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."

The defendant, in the case at bar, did not better his position by improperly handing over the money in question to those who had no right whatever to receive it, after he knew it had been stolen, and that plaintiff was its true owner. The undisputed facts connected with his possession of the money, immediately before he parted with it, are quite sufficient to raise such an implied promise as will support *assumpsit*. We are therefore of opinion that the court erred in not entering judgment in favor of plaintiff for the amount claimed, viz., four hundred dollars, with interest from May 24, 1886, the time suit was commenced before the city recorder.

Judgment reversed, and judgment is now entered in favor of the plaintiff and against the defendant for four hundred dollars, with interest from May 24, 1886, and costs.

ASSUMPSIT. — An action for money had and received may be maintained by one person against another when the latter has in his possession money to which in equity and good conscience the former is entitled: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; 28 Am. Dec. 286; *O'Fallon v. Boismenu*, 3 Mo. 405; 26 Am. Dec. 678; *Goddard v. Bulow*, 1 Nott & McC. 45; 9 Am. Dec. 663; *Glascock v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299. The right of action for money had and received is based upon the fact of the receipt of money, or its equivalent, by one from another, under circumstances such as to raise an implied promise to repay it: *Ashton v. Shepherd*, 120 Ind. 69.

MOORE v. COLT.

[127 PENNSYLVANIA STATE, 289.]

CONTRACTS — CONSTRUCTION — PENALTY OR LIQUIDATED DAMAGES. — A stipulation in a contract for the sale of interest and good-will in an omnibus business, that the seller will not again engage in, or use his influence in opposition to the buyer in, the same business, and that each party is "bound in the sum of three hundred dollars for the faithful fulfillment of the above contract," is a penalty, and not liquidated damages, and upon breach of the contract by the seller, the buyer may recover his actual damages sustained, which may be computed by the number of passengers carried at regular rates by the seller after violation of his contract.

COVENANT upon breach of contract.

George A. Allen and L. Rosenzweig, for the plaintiff in error.

E. L. Whittelsey, for the defendant in error.

PAXSON, C. J. The defendant below was clearly liable for his breach of the agreement of May 1, 1880. The only question is as to the amount of damages. The jury rendered a verdict against him for \$602.42. He now claims that the damages were liquidated by the article of agreement at the sum of three hundred dollars. The language of said agreement is as follows: "And each party is hereby held and fully bound in the sum of three hundred dollars for the faithful fulfillment of the above contract." If we interpret this contract by this language, we have the case of a penalty. It is in almost the exact terms of the ordinary penalty of a bond. There is no agreement "to forfeit," which, in *Streeper v. Williams*, 48 Pa. St. 450, was held to be the equivalent of the words "to pay," and to be liquidated damages. In *Cushing v. Drew*, 97 Mass. 445, Cushing sold to Drew certain horses and wagons, and the good-will of an express business in the town of W., for \$650, and agreed in writing not to do any express business, or cause any to be done in that town, so long as D. should do such business there, and in case he violated the agreement, he was to pay D. \$900. This was held to be liquidated damages. Cushing stipulated to do a single thing, viz., to abstain from interfering with the business of D., and if he failed in this, he was to pay Drew the sum of nine hundred dollars. It is difficult to see how any doubt could have arisen in that case.

The one in hand is not so clear. The parties have merely bound themselves in the sum of three hundred dollars for the faithful fulfillment of their contract. That contract was that

Moore (defendant below) agreed to sell to Colt (plaintiff below) all his interest and good-will in the "bus business" between the borough of Waterford and Waterford station, together with the "bus" and sleigh then in use by him, for the sum of \$150, with the stipulation that the said Moore should not engage in or use his influence in opposition to Colt, in the passenger, mail, or express business, in any manner or form; each to be held and fully bound as above stated in the sum of \$300. The nature of this stipulation, whether a penalty or liquidated damages, does not depend upon which party violates the agreement. Had the breach been by Colt, and he had refused to pay the \$150, what would have been the measure of damages in a suit against him by Moore? Would it have been the sum he agreed to pay, — \$150 with interest? or would it have been the \$300 as liquidated damages? The latter proposition cannot well be maintained.

There is no class of cases which come before us more difficult to determine upon any settled rule than this. It was said by Mr. Justice Agnew, in *Streeper v. Williams*, *supra*, at page 454: "Upon no question have courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform or consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases, the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages, where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. . . . Upon the whole, the only general observation we can make is, that in such case we must look to the language of the contract, the intention of the parties as gathered from all its provisions, the

subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." This language is so appropriate that I trust it will justify the length of the quotation.

The defendant contends that the difficulty of ascertaining the damages is a reason why the case should be treated as one of liquidated damages. The jury, however, appear to have had no difficulty upon this head. The plaintiff proved that the defendant, in violation of his contract, had carried a certain number of passengers, which, at the regular rates of fare, amounted to the sum found by the jury. This was just so much money practically taken out of the plaintiff's pocket, and no good reason is apparent why he should not be compensated. The defendant has no equity which would constrain us to hold that language which technically provides a penalty shall be treated as liquidated damages. It is true, the whole amount he received for the business, good-will, and property was only \$150. But this claim was for an interference with his business for over a year, and the direct loss to the plaintiff as found by the jury was largely in excess of the penalty. It can readily be seen that for such interference, continued for years, the sum of three hundred dollars would not be an adequate compensation.

In this view of the case, we think the evidence referred to was properly admitted. It was not offered to prove speculative profits, but to show actual loss to the plaintiff. Nor do we find any error in that portion of the charge of the learned judge embraced in the remaining assignment.

Judgment affirmed.

CONTRACTS. — As to the distinction between liquidated damages and penalty: Extended note to *Graham v. Bickham*, 1 Am. Dec. 331-340; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713, and cases cited in note; *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107, and note; *Fasler v. Beard*, 39 Minn. 33.

NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY v. ENCHES.

[127 PENNSYLVANIA STATE, 316.]

CONTRIBUTORY NEGLIGENCE — PASSENGER ON RAILROAD TRAIN, who, after reaching his station where the train stops the usual time, attempts to alight after the train has again started, and after the brakeman has warned him not to make the attempt, is guilty of contributory negligence, and cannot recover for an injury so received, and the jury should be so instructed.

CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS REGARDING MUST BE SPECIFIC. — In an action to recover for personal injuries, where contributory negligence is attributed to plaintiff, it is not sufficient to instruct the jury generally that if plaintiff is guilty of contributory negligence he cannot recover; but the court must explain to the jury what facts would constitute such negligence in view of the evidence adduced.

CASE for personal injuries. Defendant in error was a passenger on the railroad train of plaintiff in error, and when such train was approaching the station where defendant in error desired to alight, and with which she was well acquainted, she heard the name thereof plainly announced. As soon as the train stopped, she prepared to leave it, and advanced as far as the steps of the car, though hindered somewhat by incoming passengers. The train stopped the usual time; and after it had again started, she attempted to alight. The brakeman warned her not to try to alight, and he would stop the train. She disregarded his warning, and in alighting received the injury for which she brought this action. The fourth and fifth requests asked by plaintiff in error to be given by the court in charging the jury, and upon which the first and second assignments of error are based, were as follows: "4. If the jury believe, from the evidence, that the plaintiff undertook to get off the train after it began to move, she is guilty of contributory negligence, and cannot recover." To which the court answered: "This point, as a legal proposition applicable to the evidence in the case on trial, is refused; but we refer it to you to find, from the evidence, and taking all the circumstances into consideration, whether the plaintiff, in attempting to get off the train, was guilty of such negligence or want of care as contributed to the injuries complained of; if she was, she is not entitled to recover." "5. If the jury believe that the plaintiff attempted to get off after the train was in motion, in disregard of the warning of the brakeman not to, she was guilty of negligence, and cannot recover." To which the court answered: "This point is refused, as applicable to the evidence in the case on trial; but if

you find that the plaintiff attempted to get off of the train after it was in motion, and if, taking all the circumstances into account, you find that this attempt was such an act of negligence and imprudence on her part as contributed to her injury, then she cannot recover." Verdict against plaintiff in error.

W. M. Lindsey, F. P. Ray, and J. O. Parmlee, for the plaintiff in error.

Charles H. Noyes, W. D. Hinckley, R. Brown, Charles W. Stone, H. E. Brown, W. E. Rice, and A. F. Bole, for the defendant in error.

GREEN, J. There was abundant evidence in the cause that the plaintiff got off the car after it had started, and while it was in motion. In view of this testimony, the defendant's fourth and fifth points were propounded to the court below. There was no evidence that there was any necessity, apparent or real, for the plaintiff to leave the car while it was in motion, and hence there was no occasion for a qualifying reservation as to the effect of her act of leaving the car while in motion, if the jury believed such to be the fact. We are clearly of opinion, therefore, that it was the duty of the learned court below to answer the points upon the facts of which they were predicated.

This being so, the simple question raised by the fourth point was, whether the plaintiff was guilty of contributory negligence if the jury believed, from the evidence, that she undertook to get off the train after it began to move. The mere fact of the accident proved that the motion of the car was sufficient to cause the accident from the attempt to leave the car after it started, and hence the hypothesis of the point was fairly presented in the very terms in which it was stated, and required a categorical answer. We have so often held that it is contributory negligence for a passenger to leave a car while it is in motion, that it is unnecessary to discuss that question: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *McClintock v. Penn. R'y Co.*, 21 Week. Not. 133. There being nothing in the circumstances of this case to qualify the effect of the facts presented in the point, it should have been affirmed as it stood. The result of the qualified answer was to transfer from the court to the jury the disposition of the question as to the legal effect of certain facts hypothetically stated in the point, but warranted by sufficient testimony.

The same considerations are applicable in an increased degree to the answer given to the defendant's fifth point. There the act of leaving the car while in motion, and in disregard of the warning of the brakeman not to leave, was submitted to the court, and was answered in the same manner as the fourth point was answered, by referring the whole legal effect of the facts supposed by the point to the jury. There was distinct affirmative evidence that such a warning had been given, but the court entirely ignored this feature of the point, and said nothing about it in the answer. This was clear error. The answers to both these points were in reality not answers. They were mere directions to the jury that if the plaintiff was guilty of contributory negligence in attempting to leave the car, she could not recover. Of course those instructions were legally true; but they were not instructions upon the effect of the particular facts hypothetically stated in the points, and hence were not responsive to the points in any sense. If there had been no evidence to support the hypotheses of the points, the error would have been immaterial; but there was such evidence, and the defendant had a right to a specific instruction upon the effect of the facts stated. The first and second assignments of error are sustained.

We are of opinion, also, that the third assignment is sustained. On the trial of such a case, it is the duty of the court to explain to the jury what would constitute contributory negligence of the plaintiff, and then to instruct them that if they found such facts in the case, the plaintiff could not recover if the accident resulted wholly or in part from such contributory negligence. It is not enough to say, generally, to the jury that a plaintiff cannot recover if he or she has been guilty of contributory negligence. The jury must be enlightened as to what facts would constitute such negligence in view of the testimony, otherwise they have no guide by which to regulate their action in determining the controverted facts. In the present case, there was no definition or statement of any kind as to what was the meaning of contributory negligence, or as to what kind of facts would constitute it, or even tend to prove it. There is but one sentence in the charge on that subject, and that is a mere general statement of the rule of law that a plaintiff who has been guilty of contributory negligence cannot recover. All the rest of the charge is upon the alleged negligence of the defendant and the question of damages, and under the whole charge, and the answers to the points, the

jury were without any instructions, either upon the meaning of the term "contributory negligence," or upon the question as to whether there were any facts in evidence either proving or tending to prove that there was contributory negligence in the case. We have frequently held that such charges are misleading, and therefore erroneous. The third assignment is sustained. The fourth and fifth assignments are not sustained.

Judgment reversed, and new *venire* awarded.

CONTRIBUTORY NEGLIGENCE. — In an action against a company for the death of a passenger who was killed by attempting to leave the train while in motion, it appearing that he had failed to avail himself of the opportunity to alight during the usual stop allowed for outgoing passengers, but waited till the train began to move, in the absence of carelessness on the part of the company's employees, the company was not liable for such passenger's death: *Illinois etc. R. R. Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109.

CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM TRAINS while in motion: *Central Railroad and Banking Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505, and note; *Jewell v. Chicago etc. R'y Co.*, 54 Wis. 610; 41 Am. Rep. 63, and note. Whether it is contributory negligence in a passenger to alight from a moving train is ordinarily a question for the jury to determine: *Raben v. Central R. R. Co.*, 72 Iowa, 732; but a plaintiff's negligence in alighting from a moving train must be the proximate cause of his injury before it will bar his right of recovery: *Craven v. Central Pac. R. R. Co.*, 72 Cal. 345.

SMITH v. TUIT.

[127 PENNSYLVANIA STATE, 341.]

WILL AS CONVEYANCE — STATUTE OF FRAUDS — SPECIFIC PERFORMANCE. —

A will providing that the beneficiary thereunder shall have immediate possession of the land of the testatrix, provided he shall take the latter and care for her as one of his own family during her natural life, is a sufficient compliance with the statute of frauds, where the beneficiary takes possession and complies with his part of the contract as indicated by the paper; and in such case, the fact that it is not to take effect finally until the testator's death will not prevent specific performance during the testator's lifetime.

EJECTMENT — EVIDENCE. — WHERE DEFENDANT IN EJECTMENT CLAIMS UNDER THE WILL of a living person providing that he shall have immediate possession of the land in dispute on condition that he takes the testatrix and cares for her as one of his own family during her natural life, evidence is admissible to show that he took and still retains possession under the will, that the testatrix lived with him for a long time, and that he has performed his part of the contract as indicated by the will.

EJECTMENT — STATUTE OF FRAUDS — WILL AS CONVEYANCE. — Defendant in ejectment, who has taken and retains possession, and has performed his part of the contract as indicated in the will of a living person, providing

that he shall take immediate possession of the land in dispute, on condition that he will take and care for testatrix as one of his own family during her natural life, cannot be deprived of his possession because the contract is contained in the will. The latter is a sufficient compliance with the statute of frauds, as constituting a memorandum for the sale of lands.

EJECTMENT by Tutt against Smith, who was in possession of the disputed land, claiming under the will of Sarah Smith, who was living at the time of trial. Verdict for plaintiff. Defendant assigns error.

Edward Campbell, George D. Howell, and E. H. Reppert, for the plaintiff in error.

A. D. Boyd, P. S. Morrow, and D. M. Hertzog, for the defendant in error.

GREEN, J. By the terms of the paper called the last will and testament of Sarah Smith, she devises all her estate, real and personal, to Laura E. Smith, and expressly states that she does so for the kindness and care toward her in sickness and in health, "and care during all my natural life." She adds that it is her desire that Smith shall have possession of the house on November 1, 1884, and take her with him, and take care of her as one of his own family. Without anything more, and without possession of the property on the part of Smith, and performance by him of the acts mentioned in the will to be done by him, the paper in question could not be regarded as anything more than a will, revocable at the mere pleasure of the testator. But the offer of parol proof introduces other facts into the case, and as these were rejected by the court below, they must be regarded as true for the purposes of this case. These facts were, that the defendant, the devisee named in the will, took possession of the house and land in dispute under the will, and in pursuance of it, and that he was still there at the time of the trial; that the testatrix, Sarah Smith, moved into the premises with the devisee, in pursuance of the intention stated in the will, and there remained for a long time; and that the defendant at all times performed his part of the agreement indicated in the paper.

The offer should have been somewhat more specific, and stated the acts which the defendant did in performance of his part of the agreement; but as it does allege an actual performance, it should be regarded as made in good faith, and therefore as fairly raising the question for consideration. Viewed

In that light, the question is, What effect is produced upon the testamentary paper if the facts offered to be proved are true? It has long been held that such a case is not affected by the statute of frauds, because the terms of the agreement are put in writing, to wit, the will, and this is a sufficient compliance with the requirements of the statute: *Brinker v. Brinker*, 7 Pa. St. 53. The circumstance that it is not to take effect finally until after the testator's death will not prevent a specific performance during the life of the testator, if he has put the other party to the agreement in possession of the land. This was held in *McCue v. Johnston*, 25 Id. 306, where the decree was refused only because there was no provision for possession during the life of the devisor in either the will or written contract, and no sufficient proof of a verbal contract for such possession. But in *Johnston v. McCue*, 34 Id. 180, the same will and agreement were enforced in favor of the first devisee against devisees by a subsequent will, on the ground that the first will and agreement must be treated as an executed contract, which the devisor was not at liberty to disregard. It is true, in that case, the stipulation of the devisee was expressed in a written paper, but the decision of the question as to how the will was to be regarded was not put upon that ground; and in *Brinker v. Brinker*, *supra*, the devisee's part of the contract was in parol, but he was nevertheless held entitled to treat the will as a contract, and not as a will, and to have specific performance. It is true, this was before our statute of frauds was passed, but the will was held to be a sufficient writing to take the case out of the statute in any event. In *McCue v. Johnston*, *supra*, the court said: "In point of fact, so far as the instrument by which the conveyance is to take place is involved, it is an executed contract on condition, to take effect at the time specified. A devise transfers the legal estate, and not an equity to be perfected by another instrument. It is the same as if a deed had been executed to take effect *in futuro*, only that the common-law incident of a feoffment forbids the freehold remaining in abeyance, and a resor must therefore be had to a devise or a conveyance under the statute of uses."

It is clear, therefore, upon all the authorities, that the testamentary character of the testator's agreement is not a bar to relief as upon an executed contract. The difficulty in regard to possession by the devisee during the lifetime of the devisor is removed, in the present case, by the fact that the will itself

provides for a present possession to begin the day after the will was executed. Now, the offer of proof was, that such possession was actually taken by the devisee, and that he literally complied with the terms of the will by taking the devisee in with him, and keeping her there a long time, and that he performed all of his part of the contract, and is still in possession. The only practical question, then, is, Can he be deprived of his possession because the contract is contained in a testamentary paper? Certainly not, if for no other reason because depriving him of his possession would disable him from the further performance of his contract, for which purpose his possession is indispensable according to the terms of the will itself.

We think, therefore, the learned court below was in error in rejecting the offer of proof by the defendant.

Judgment reversed, and new venire awarded.

WILLS. — An instrument passing property in the donor's lifetime, although of alleged testamentary character, being not absolutely a will, must be a deed, for there is no middle ground: *Hileman v. Bonslough*, 13 Pa. St. 344; 53 Am. Dec. 474. As to when instruments will operate as deeds, and not as wills, see *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376, and extended note 383-389; *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28, and note.

WILSON v. VAN LEER.

[127 PENNSYLVANIA STATE, 371.]

WITNESSES — COMPETENCY TO PROVE HANDWRITING. — It is within the province of the court to hold a witness competent to testify as to the genuineness of handwriting, on the ground of his familiarity with it, though the witness has not seen the alleged writer write later than thirty-two years before the trial, and then had only seen him write two or three times. The jury, however, are the judges of the weight to which such evidence is entitled.

WITNESSES — COMPETENCY TO PROVE HANDWRITING. — No arbitrary limit of time can be fixed within which a witness must have seen writing done in order to be competent to testify to its genuineness. His intelligence, habits of observation, and apparent strength and confidence of memory must first be considered by the court, and if it determines to admit his evidence, the jury must then determine what weight they will accord it.

EVIDENCE — ALMANAC — JUDICIAL NOTICE. — Counsel may refer to an almanac, in his argument to the jury, to show that a witness has testified falsely as to a certain day of a certain week or month, although the almanac is not proved and put in evidence. The court will take judicial notice of the coincidence of the days of the week with the days of the month.

EVIDENCE — JUDICIAL NOTICE. — Matters of which judicial notice is taken, as the dates in an almanac, need not be put in evidence.

PLEADING AND PRACTICE — OBJECTION TO ALMANAC AS EVIDENCE. — That counsel used an almanac in his argument to the jury, to show that a witness testified falsely as to a certain date, is not open to objection on the ground that such use of the almanac deprived plaintiff of the benefit of argument upon it. Such surprises are incident to every trial, and within the discretion of the court.

ISSUE *devisavit vel non*, to try whether a certain paper, to which there were no subscribing witnesses, was a codicil to the last will of Needham Wilson. The paper was as follows:—

“August 13, 1865.

“I give thes few lines to Caroline Carman to show that I want her to have the sum of twelve hundred dollars at my death she livd with mee A number of years And got verry little for it so i thought it rite to leave her This little sum to to be paid out of my home property

“from NEEDHAM WILSON.”

Margaret Manahan testified that she had known Wilson for a long time; that she saw him write and sign his name to the paper dated August 13, 1865, and that she was positive that that date did not fall on Sunday, for reasons given by her. In his argument to the jury, counsel offered to show from an almanac that August 13, 1865, did fall on Sunday. This was objected to, and objection sustained. Another witness, Cornelius Carman, testified that thirty-two years before the trial he was living with Wilson, and saw him write two or three letters at that time; that in October, 1865, he also saw him write a memorandum of articles which he wished to purchase, and also at that time saw him write his own name on a check, but had not seen him write since. Judgment for plaintiffs, and defendants bring this writ of error.

J. Hay Brown, and S. H. Reynolds, for the plaintiffs in error.

D. G. Eshleman and A. Herr Smith, for the defendants in error.

MITCHELL, J. The competency of Cornelius Carman was in the first instance clearly a matter for the court, and no subsequent evidence having raised any dispute of fact upon it, the learned judge was right in saying that the court was the sole judge of competency, and refusing to allow the jury to review the ruling. Had the facts upon which the judge held.

him *prima facie* competent been denied or contradicted, it might have been proper to submit the whole matter to the final decision of the jury: *Lee v. Welsh*, 1 Week. Not. 453; but there was no such conflict as made that course necessary.

The learned judge was also within the line of authorities in holding that Carman had sufficient knowledge of Wilson's handwriting to make him competent to testify concerning it. It is said to be sufficient if the witness has seen the party write but once, and then only his name: 1 Greenl. Ev., sec. 577; and probably no higher standard can be fixed for a definite rule, though, considering the untrustworthiness of opinions on handwriting in general (see note of Chief Justice Redfield to his edition of Greenleaf, vol. 1, sec. 578), such evidence ought to be guarded with great caution. Nor in the nature of things is it possible to fix any arbitrary limit of time within which the witness must have seen the writing done. That must depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge. Carman's knowledge seems not only to have been extremely stale, but of the narrowest extent, and if the learned judge had held that it was too remote and unreliable to qualify him, we should not have been disposed to disagree with him. But the matter was within his discretion, and his conclusion was, as already said, within the line of the authorities. It was therefore for the jury, and not for us, to determine the weight to which the testimony should be entitled. The assignments of error in relation to Carman's testimony are therefore not sustained.

We are obliged, however, to hold that the court erred in refusing to permit the counsel for defendants below to refer to the almanac to show, in support of his argument against the testimony of Margaret Manahan, that a certain date in 1865 fell upon Sunday. All of the authorities agree that this is one of the matters that do not require to be proved, but are taken judicial notice of, without evidence. "Neither is it necessary to prove . . . the coincidence of days of the week with days of the month": 1 Greenl. Ev., sec. 5; and see Starkie on Evidence, pt. 3, sec. 20 (p. 738 of 10th Am. ed.). "It is wholly immaterial whether the facts of public and general history, and their dates, are recognized by the court, *sua sponte*, the chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by

the parties and verified by the books; or whether the books themselves are adduced by the parties as instruments of evidence,—the process and the result being in each case the same”: 3 Greenl. Ev., sec. 269.

The mere mode of introducing the almanac seems to vary, as indicated by the last extract from Greenleaf, but as all the authorities agree that no proof is necessary, it follows that it is not required to be put in evidence at all. “The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury”: *State v. Morris*, 47 Conn. 179. “The almanac is part of the law of England”: Pollock, C. B., in *Tutton v. Darke*, 5 Hurl. & N. 649.

In *Hanson v. Shackleton*, 4 Dowl. 48, there was a rule to set aside a writ on the ground that it was dated on Sunday, and the report proceeds:—

“Coleridge, J.: Have you an affidavit showing that the day on which this writ is dated was a Sunday?

“Bayly: The affidavit does not state that it was Sunday, but, the day of the month being given, the court is bound to take judicial notice on what day of the week that day fell. C. A. V.

“Coleridge, J.: I have consulted the other judges, and they are of opinion I ought to take judicial notice of what the day was on which this day of the month fell. Rule absolute.”

So in *Reed v. Wilson*, 41 N. J. L. 29, there was a declaration on a note dated August 12th, at four months, and on demurrer assigning, *inter alia*, that the *narr.* showed demand and protest on December 14th, one day too soon, the court took judicial notice that December 15th was Sunday, and, therefore, that the demand was made on the proper day.

In *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 226, 40 Am. Rep. 415, it was held that “it is the duty of the court to notice the days of the week on which particular days of the month fall; and hence we know, without other averment (on demurrer), that the 28th of July was Sunday.”

And in *Mackintosh v. Lee*, 57 Iowa, 358, it was said by the court: “The petition alleges that the defendant entered into the written lease on March 10, 1878. Courts take judicial notice that the tenth day of March, 1878, was Sunday. The petition, therefore, in effect, alleges that the lease was executed on Sunday”; and it was, therefore, held that, under the plead-

ings, evidence was not admissible that the lease was executed on Monday.

These authorities (and none have been found in opposition to them) show clearly that, however often departed from as a matter of convenience, the rule is, that matters of which judicial notice is taken, including the dates in the almanac, do not require to be put in evidence at all.

It is argued for the defendant in error that the fact of August 13th having been Sunday did not necessarily contradict Mrs. Manahan, and therefore that even if the court below committed an error, it was an immaterial one, for which the judgment should not be reversed. But there was an apparent contradiction, which, at least, required explanation; and in a case where the evidence in support of the plaintiff's case was so meager, it is impossible to say that even a slight doubt thrown on the testimony of the main witness would not have turned the scale in the minds of the jury.

It is also argued that the almanac having been brought forward at so late a stage in the case deprived the plaintiff below of the benefit of an argument upon it by one of her counsel. But, in this respect, it was like any other argument or illustration which counsel may make towards the end of a case. If it has not been anticipated, it is a surprise, and that is a risk which parties must encounter in every case. If counsel had run the calculation back himself, so as to show that that day was Sunday, no one could have questioned his right to do so. His reference to the almanac was no more than a reference to the multiplication table, as a labor-saving mode of refreshing or confirming knowledge legally presumed to be in everybody's mind. This kind of surprise is one of the dangers incident to every contest, and the only relief against it is the discretion of the judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply, or subsequently to grant a new trial.

Judgment reversed, and *venire de novo* awarded.

WITNESSES TO PROVE HANDWRITING — COMPETENCY. — Witnesses who have seen a party write are competent to testify as to the genuineness of writings alleged to have been written by him: *Travis v. Brown*, 43 Pa. St. 9; 82 Am. Dec. 540; *Clark v. Wyatt*, 15 Ind. 271; 77 Am. Dec. 90; *Cross v. People*, 47 Ill. 152; 95 Am. Dec. 474; *Pope v. Asato*, 1 Ired. 16; 35 Am. Dec. 729, and note; *Bulen v. Granger*, 63 Mich. 311.

PROVINCE OF JURY WITH RESPECT TO EVIDENCE. — The jury must decide upon the weight to be given the testimony of witnesses: *Kelly v. Emery*, 75 Mich. 147; *Norris v. State*, 87 Ala. 85.

JUDICIAL NOTICE. — Proof is never required of facts judicially noticed: Note to *Lanfear v. Mestier*, 89 Am. Dec. 664. As to what facts are judicially noticed: Id. 663-697. Judicial notice is taken of the general system of governmental surveys of state lands: *Quinn v. Champagne*, 38 Minn. 322. Judicial notice will be taken that land in Indiana described as "the east half of the southeast quarter of section 22, township 23 north, range 10 east," is not a fractional eighty-acre tract: *Peck v. Sims*, 120 Ind. 345. Courts of Alabama will take judicial notice of the fact that large sums have been invested in the mineral development of that state; that the method of washing ores is such that a sediment necessarily accumulates upon the lands below where such washing is done: *Clifton Iron Co. v. Dye*, 87 Ala. 468. But courts do not take judicial notice of the records of land titles in the office of the register of deeds: *Williams v. Langevin*, 40 Minn. 180.

EVIDENCE. — Almanac, when admissible in evidence: *Munshower v. State*, 55 Md. 11; 39 Am. Rep. 414, and note.

MARTIN v. FRANTZ.

[127 PENNSYLVANIA STATE, 589.]

CONTRACTS — CONSIDERATION. — An agreement to accept a smaller sum in satisfaction of a larger one presently due is without consideration and void, and the actual acceptance of the smaller sum does not discharge the debt even as an accord and satisfaction.

SURETYSHIP. — Co-SURETY'S RIGHT TO CONTRIBUTION arises out of his payment of more than his due proportion of the joint obligation, and dates from such payment, unaffected by the fact that the statute of limitations has barred any direct liability of his co-surety to the creditor.

ASSUMPSIT by Frantz as the assignee of one Eshbach on a note given by John U. Charles as principal, and David Martin and B. U. Charles as sureties. This note was given April 1, 1879, payable one year after date, and the interest thereon was paid yearly by John U. Charles, until 1884, when he became insolvent, and unable to make any further payments. On April 1, 1886, David Martin, by his son J. M. Martin, paid the assignee and holder of the note one year's interest, from April 1, 1884, and also seven hundred dollars, one half of the principal, with the understanding and agreement that, upon such payment, he (Martin) was to be released and relieved from all further liability on the note. On January 1, 1888, Eshbach indorsed and delivered the note to J. M. Frantz, who brought this action against B. U. Charles, David Martin, and J. U. Charles. B. U. Charles never paid anything on the note, nor promised to pay, and consequently entered the

plea of limitations successfully. David Martin interposed a plea of accord and satisfaction, and also the statute of limitations. The jury was instructed to return a verdict for plaintiff, and defendant excepted to the charge. Verdict and judgment for plaintiff against J. U. Charles and D. Martin for \$861.70. Martin appeals, and assigns error.

Philip D. Baker, for the plaintiff in error.

W. R. Wilson and Andrew M. Frantz, for the defendant in error.

MITCHELL, J. It is too well settled to admit of discussion that an agreement to accept a smaller sum in satisfaction of a larger one presently due is without consideration, and cannot be enforced: *Brockley v. Brockley*, 122 Pa. St. 1; and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction: *Mechanics' Bank v. Huston*, 11 Week. Not. 389.

It is clear, therefore, that the agreement relied on by the defendant below was without consideration in the way of benefit accruing to the plaintiff, and it must fail as a defense unless it imposed some burden or disadvantage on the defendant. All that is claimed for it in this regard is, that it allowed the statute of limitations to run in favor of the co-surety, B. U. Charles, and thus deprived defendant of his right to contribution. The authorities, however, are quite uniform that this result does not follow.

"The right of action for contribution does not arise until payment of more than a due proportion, and hence the statute of limitations does not begin to run until then": *De Colyar on Guaranties*, Morgan's Am. ed., 354; and see *Parsons on Contracts*, 33-37, and cases there cited.

The precise point involved here has been expressly decided by several courts of the highest authority. Thus in *Peaslee v. Breed*, 10 N. H. 489, 34 Am. Dec. 178, one of two joint makers of a note was protected against the holder by the statute of limitations, while the other, through payments made by himself, remained liable. The latter, having paid, was held entitled to recover of the former his share for contribution, Parker, C. J., saying: "We are of opinion that the plaintiff is entitled to recover for the amount paid after the period when no action could have been sustained directly against the defendant by the payee of the note."

In *Boardman v. Paige*, 11 N. H. 438, the rule is thus stated:

“When one promisor still continues liable, . . . and is compelled to pay, . . . the liability of the co-promisors for contribution will still remain, notwithstanding . . . they may be discharged by the operation of the statute of limitations from their liability to the promisee.”

In *Wood v. Leland*, 1 Met. 387, it was said by Chief Justice Shaw: “Defendants contend that as they could not be held responsible to the obligee after the year, so they would not be liable for contribution to a surety after that time. But the court are of opinion that the statute of limitations cannot be so applied. It may well be admitted that the statute of limitations would be a good bar to an action by the obligee; . . . but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money pursuant to that breach.”

And in *Camp v. Bostwick*, 29 Ohio St. 337, 5 Am. Rep. 669, it was held that the right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his just share of a joint burden; and “this equity having once arisen between co-sureties,” says McIlvaine, J., “neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away.”

It is thus clear on the authorities that whatever rights of contribution plaintiff in error may have arise out of his payment of more than his due proportion of the joint obligation, and will date from such payment, entirely unaffected by the fact that the statute of limitations has barred any direct liability of his co-surety to the creditor.

The agreement relied on, being, therefore, without consideration, either by way of advantage to the plaintiff or disadvantage to the defendant, was not a valid defense, and the learned judge was right in directing a verdict for plaintiff.

Judgment affirmed.

SURETYSHIP — RIGHT OF CO-SURETY TO CONTRIBUTION. — This subject is thoroughly discussed in an extended note to *Gross v. Davis*, 10 Am. St. Rep. 639-647.

ACCEPTANCE OF A LESSER SUM DOES NOT, ordinarily, bar a demand for a greater: *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886; but an offer to pay less than the whole amount of a debt before due, in full satisfaction thereof, and an acceptance of the offer, and payment accordingly, constitute an accord and satisfaction supported by a good consideration: *Boyd v. Moats*, 75 Iowa, 151.

LONG v. PAUL.

[127 PENNSYLVANIA STATE, 453.]

WILLS — CONSTRUCTION — LIFE ESTATE. — A bequest by a testator of the "improvements" and "income" of his dwelling-house and lot to his wife for her own use, "so long as she keeps my name," with directions that she should pay his debts, and, if necessary, sell so much of the land as should be required for that purpose, and to keep the rest, and in case of her remarriage, she was to have "one half of all my real and personal property for her own use," creates only a life estate in the devisee during widowhood.

EJECTMENT by Catharine Paul and others against Jacob Long and wife. The testator died, leaving surviving him Catharine Paul, married to Elias Paul, and other brothers and sisters, who are plaintiffs here. He also left surviving him his wife, Sarah Maurer, who remained his unmarried widow until her death. She left surviving her her father and mother, Jacob and Rachel Long, who, together with her brothers and sisters, are in possession of the disputed premises. The will of Cornelius Maurer is as follows: "I give and bequeath to my beloved wife, Sarah Maurer, all my household furniture, my library in my mansion or dwelling-house, my cow and heifer, and hogs chickens, and all my carpenter tools, and all grain and other personal property not mentioned, also all moneys and money due me or hereafter may come due to be collected by my beloved wife Sarah Maurer, herein named, as soon after my deceased as can be consistently with a property settlement of all my debts; and to have an to hold the same to her and assigns; and I also give, devise, and bequeath to her, my said wife Sarah Maurer, all my improvements and income of my messuage and lot and house where I now live, and all that peace of land where Samuel Weary lived, now deceased, bud now occupied by his wido Catharine Weary, on which a dwelling-house and barn is on, containing ninety-three acres, more or less, with its appurtenances; and all that piece or parcels of land situated, etc., here described, on the south by Mahanoy Creek, on the west by Benjamin Kness and others, on the north by land of the estate of Thomas Henninger, on the east by lands of Amos Vastine; and my beloved wife, Sarah Maurer, is to pay all my debt, and if she cannot pay it, she shall sell so much of the land to pay for the rest of the land, and keep it for her one youse, as long as she keeps my name and after she marries and dound keep my name any more she shall have the one half of

all my real and personel property for her own youse and the other half I beques to my 3 sisters share and shore alike Catharine intermarried to Elias Paul, Sellome intermarried with John Groh, Lusina intermarried with Joseph B. Becker. Lastly I appoint my esteemed friend Jarred Henninger to be the executor of this my last will and testament after my beloved wife, Sarah Maurer, dound keep my name my above executor shall thevide it to my wife the one half of all real and personall property and the other half to my three sisters share and share alike if can be devided without spoyling the hole if spoyling the hole he shall selling it at public sale and divided the money is directed in witness whereof, I Cornelius Maurer the testator have to this my will written on one sheet of paper set my hand and seal this tenth day of September A. D. one thousand eight hundred and seventy-eight."

"CORNELIUS MAURER. [L. S.]

"Witness: C. K. WEIKEL.

DANIEL BILLMAN."

Judgment for plaintiffs. Defendants bring error.

S. B. Boyer, for the plaintiffs in error.

Charles B. Witmer, for the defendants in error.

MITCHELL, J. The draughtsman of this will had a very limited command of the English language, and even this was evidently hampered by the recollection of the form-book. But taking the whole will together, the testator's intention is reasonably clear to give his wife the use and income of his whole estate so long as she remained his widow, and of half of it in case she remarried, but not in either event to give her more than a life estate in the realty. The lands are expressly given to her "to keep for her own use, as long as she keeps my name," which is plainly a gift during widowhood, and, therefore, an estate for life determinable on a second marriage. In this regard the case is not distinguishable from *Cooper v. Pogue*, 92 Pa. St. 254, 37 Am. Rep. 681, and indeed is by no means so strong a case for plaintiffs in error's contention as that was.

The first devise as to realty is of the "improvements and income" of his dwelling-house, and it is conceded that these words in general carry the land. But the gift of the improvements and income is only "so long as she keeps my name," and cannot be more effective than a gift of the land itself, which, expressed in those terms, would not extend beyond a life estate.

Nor is this estate enlarged by the provision that she shall pay the debts, and if she cannot (otherwise) she shall sell so much of the land as will enable her to keep the rest. This is only a power, not an estate, and is limited to the payment of debts, thus merely enabling the devisee to do in her own way what the law would do compulsorily for her without this provision. So far, indeed, as this clause of the will bears upon its construction at all, it would seem to indicate that the testator himself did not intend to give a fee; for if he had done so, the power of sale would have been superfluous, except as a matter of convenience on account of the possibility of the determination of the estate by a second marriage.

But after the devise to the widow so long as she remains unmarried, there is a provision for the case of her remarriage, in which event she is to have "the one half of all my real and personal property for her own use, and the other half I bequeath to my three sisters," etc., and the further provision that the executor shall make the division, and if it cannot be done without spoiling the whole, then he shall sell the property and "divide the money as directed"; and it is argued that this is a gift of the *corpus* of one half in case of remarriage, and therefore, unless the first estate was a fee, a larger provision in case of second marriage than in the event of remaining a widow, which would be clearly contrary to the testator's main intent. While a fee in one half would probably have been called by the early lawyers an estate of higher dignity than a life estate in the whole, I am not aware of any rule which would enable us to say as a matter of law that it was a larger or more favorable provision for a widow. That is a question of fact which depends on circumstances, and must always be largely a matter of individual choice. But it is by no means clear that this is the proper construction of the provision in case of remarriage. On the contrary, the repetition of the phrase "for her own use" seems rather to be meant to continue the idea of a life estate contained in the preceding clause, and if so, the direction to the executor to make the division of the property, and if that cannot be done, to sell, and divide the money, would be subject to the same limitation, to wit, to her own use for life. As the widow, however, did not remarry, our only concern with these parts of the will is their bearing on the construction of the previous clause, and as to it they give us very little light.

On the whole will, even if the intent to give only a life

estate were more doubtful than it is, we could not distinguish this case from *Cooper v. Pogue*, already cited. With variations of language, the substance of the gifts is identical, and while will cases are rarely precedents for more than the principles they illustrate, yet where there is such substantial identity, not only in intent, but in expression, the prior case is at least very strong confirmation of the correctness of the view we have taken of the present. And the same remarks apply with great force to the notably analogous case of *Nash v. Simpson*, 78 Me. 142.

The learned judge below gave the true construction to the will, and we do not think his reference to the auditor's report, etc., in a previous cause under the same will, was going outside of the case stated for facts, but only a reference by way of illustration and confirmation of his views, to an authority that was necessarily very pertinent.

Judgment affirmed.

WILLS. — Where a testator gave and bequeathed to his wife "the farm" upon which he lived, also all his personalty, so long as she remained a widow, and at the expiration of that time, the whole property remaining to descend to his daughter, the widow took only a life estate in both real and personal property, while the daughter took a vested remainder in both: *Green v. Hewitt*, 97 Ill. 113; 37 Am. Rep. 102, and note 104. Compare *Koenig v. Kraft*, 87 Ky. 95; 12 Am. St. Rep. 463, and note.

PEEK v. HEIM.

[127 PENNSYLVANIA STATE, 500.]

CONDITIONAL SALE VOID AS TO CREDITORS. — A written consignment affixed to an invoice, and accepted in writing by the consignee, stating that the piano consigned is the property of the consignor, and is so to remain until fully paid for, that it is shipped and delivered to the consignee upon the express condition that he shall remit the price asked, or return the piano, at his own expense, at the expiration of the time stated, is a conditional sale, with an agreement that the title is to remain in the consignor until the price is paid; and although it is good as between the consignor and consignee, it is void as to the latter's creditors.

FACTOR'S GOODS, CONSIGNED TO A FACTOR FOR SALE, remain the property of the consignor, and are not subject to the debts of the factor; and no ingenious contract is required to protect them from his creditors.

FRAUDULENT CONVEYANCE. — An agreement made for the purpose of covering up a sale and preserving a lien in the sellers for the price of the goods is void as respects creditors of the buyer, whether credit was given before or after the delivery of the goods. A consignment made for such purpose is no better than any other device.

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Lewis Dewart, for the plaintiffs in error.

S. P. Wolverton and George B. Reimensnyder, for the defendants in error.

By COURT. This was a feigned issue under the sheriff's interpleader act. The pivotal question is, whether the property levied upon by the sheriff had been consigned to Hill, the defendant in the execution, as the factor or consignee of Peek and Son, to be sold by him on their account, or whether the transaction amounted to a conditional sale, with an attempted reservation of a lien for the price. The court below took the latter view of it, and instructed the jury accordingly. All of the assignments of error bear upon this point.

We see no error in the ruling of the court. The whole contract appears from the two papers, the one headed "Terms of Consignment," and signed by Peek and Son, and the other headed "Consignee's Agreement," and signed by F. K. Hill. It is true the words "consignor" and "consignee" appear sufficiently conspicuous, but these are merely labels which the parties have placed upon the transaction; we must look within to see its real nature, and it is immaterial what the parties designate it. We thus learn from the terms of consignment that the piano named and invoiced, and consigned to Hill, "is the property of Peek and Son, of New York City, and is to remain their property until fully paid for; and the said Peek and Son ship and deliver the same upon the express condition that F. K. Hill, of Sunbury, in the state of Pennsylvania, shall remit the sum of \$165 to them therefor, within from the date hereof, or return the said piano to them at the expiration of the said time, at the expense of the said F. K. Hill." Then follows the consignee's agreement, by which Hill acknowledges having received the piano on consignment, that it is to remain the property of Peek and Son until paid for, and if not paid for, to be returned, at his own expense, etc.

That this was not an ordinary transaction between consignor and consignee is too plain for argument. Where goods are consigned to a factor for sale, they remain the property of the consignor, and are not subject to the debts of the factor, and no ingenious contract is required to protect them from his creditors. There is nothing upon the face of the papers to indicate that Hill was to sell the pianos for the account of Peek and Son, as their factor. On the contrary, it was manifestly a sale to Hill, with an agreement that the title was to remain

in Peek and Son until the price was paid. The arrangement was good between the parties, but worthless as to Hill's creditors. The secret lien attempted to be created cannot affect them. It would seem almost a waste of time at this late day to cite authority for so evident a proposition. I will refer, however, to *Thompson v. Paret*, 94 Pa. St. 275, where it was said by our late brother Trunkey: "Whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such object was no better than any other device": See also *Stadtfeld v. Huntsman*, 92 Id. 53; 37 Am. Rep. 661; *Forrest v. Nelson*, 108 Pa. St. 481. These decisions are in harmony with a long line of cases which are familiar to the profession. What we have said covers all the assignments of error.

Judgment affirmed.

AGREEMENT TO CONSIGN GOODS to an insolvent for selling purposes is not fraudulent as to creditors, and vests no property in the consignee subject to levy, where such agreement provides that the goods must not be sold below the invoice price, which is to be paid to the consignor, the consignee to keep all money over that amount, and to return any goods remaining unsold: *McCullough v. Porter*, 4 Watts & S. 177; 39 Am. Dec. 68, and cases cited in note.

CONDITIONAL SALES. — Contracts for the lease of pianos and other personal property providing for payment in installments are usually considered as conditional sales, with the rights and liabilities which grow out of the latter transactions: *Gerow v. Castello*, 11 Col. 560; 7 Am. St. Rep. 260, and particularly cases cited in note; compare *Wheeler etc. Mfg. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575, and note.

FACTORS. — Property in goods consigned to a factor for sale remains in the consignor, and can be levied upon by the creditors of the consignor: *Bonner v. Marsh*, 10 Smedes & M. 376; 48 Am. Dec. 754; compare *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290, and note; *First Nat. Bank v. Ege*, 109 N. Y. 120; 4 Am. St. Rep. 431, and note.

APPEAL OF KISTERBOCK.

[127 PENNSYLVANIA STATE, 60L.]

CORPORATIONS. — STOCK CERTIFICATES issued by a corporation having power to issue them are a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and a purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation.

CORPORATIONS — STOCKHOLDERS, RIGHTS OF. — Where one has expended money upon the faith of official certificates of stock issued by a corporation, he has a right to be indemnified, to the extent of his expenditure, against loss from false certificates, but only because of such expenditure.

CORPORATIONS. — FRAUDULENT STOCK CERTIFICATES are not certificates, in legal contemplation, and give no rights of their own force. Still, the act of the corporation in issuing them, they having been accepted and acted upon in good faith by another, estops the corporation from denying their validity.

CORPORATIONS — RIGHTS OF HOLDER OF FRAUDULENT STOCK. — Where fraudulent certificates of stock are issued to one and transferred by him to another as collateral security for a pre-existing debt, the latter, having advanced nothing on the faith of the statements made in the stock, is not injured thereby, and has no claim for indemnity which he can enforce against the corporation.

CORPORATIONS. — PLEDGER OF FRAUDULENT CERTIFICATES OF STOCK, who has advanced money upon the faith of the representations made in the face of the stock, is entitled to indemnity for his loss against the corporation issuing the stock.

CORPORATIONS — RIGHTS OF PLEDGER OF FRAUDULENT CERTIFICATES OF STOCK. — Where the holder of fraudulent certificates of stock, who has no right of indemnity thereon, pledges them to one who in good faith advances money on the faith of the representations made on the face of the stock, and receives as indemnity genuine shares instead of the false ones, the latter becomes the absolute owner of the genuine shares, and the pledgor has no right of recovery as against him.

John G. Johnson and William H. Lex, for the appellant.

F. Carroll Brewster and F. H. Cheyney, for the appellee.

GREEN, J. Undoubtedly, the overshadowing, controlling question in this case is the character of the plaintiff's title.

Certainly the relation of pledgor and pledgee was intended to be created by the original transaction between the parties. We should have no difficulty in enforcing the pledge in this proceeding and in accordance with the decree of the court below, if the proper conditions existed with relation to the substance of the pledge. The case is quite peculiar, not to say without parallel, in its facts.

The plaintiff had possession of two papers which purported to be certificates of stock of the West Philadelphia Passenger Railway Company, one for two hundred and the other for one

hundred shares. The former was issued in the name of John W. Patten and Son, and the latter in the name of Charles Lennig. These certificates the plaintiff pledged to the defendant as collateral security for the payment of three notes, made by himself, payable to his own order, each for the sum of eleven thousand five hundred dollars. The actual transaction was made by one Capp, who borrowed the money from the defendant and delivered to him the notes of Elbert and the certificates. The money was borrowed and the notes and certificates delivered in 1876, and the notes were renewed from time to time. The certificates were transferred early in 1876, on the books of the company, into the name of the defendant, and continued to be held by him. In September, 1877, it was discovered that these certificates, along with a large number of others, had been fraudulently issued by John S. Morton, the president of the company, and that they were altogether false and spurious. The plaintiff, being utterly insolvent, neither redeemed them, nor at any time offered to pay any part of the debt.

Upon proceedings instituted against the company, it was determined that as against persons who had paid for the stock, or advanced money upon the faith of it, the company was estopped from denying its legality, and was bound to either issue genuine shares, or pay value for those which were false. The court in which those proceedings were conducted specially decreed that Josiah Kisterbock was entitled to receive certificates for three hundred genuine shares of the stock, or, in case of his refusal to take shares, he could take seventy-five dollars per share in money for the spurious shares held by him. He elected to take the three hundred shares, and did so, and it is these shares which the plaintiff claims to have decreed to him upon payment of the debt and interest due to Kisterbock. The latter claims they are his absolutely, without liability to account to the plaintiff for anything connected with them.

It is entirely undisputed that the plaintiff never bought these shares, and that when they were pledged to Kisterbock he alone advanced all the money that was advanced upon them and on the faith of their genuineness.

It has not been found as a fact by the master, in the present case, that the plaintiff was ever the owner of these stocks, or that he ever paid any money for them, or advanced any money on them to Morton or to any other person. The plaintiff alleged that there was a large balance of account due to

him by Morton from the year 1870, and that he received these shares, or was entitled to hold them as security, for the payment of that indebtedness and of other and further indebtedness due upon an accounting. But he also alleged and testified that he borrowed money for Morton on the shares of West Philadelphia railway stock, giving his own notes, and pledging the certificates of stock as collateral. The whole subject of these transactions, and of Elbert's claim, both as a creditor of Morton upon an accounting, and as a lender of money to Morton upon faith of these stocks, was thoroughly and most fully considered and decided by the master in the present case, when acting as master in another case, in which Elbert claimed to recover for the value of shares of stock in the same company pledged to Isaac Jeanes & Co. The master then reported that there was no sufficient evidence before him to prove the alleged indebtedness of Morton to Elbert, and he ruled that if the false stock certificates were delivered to Elbert as security for an antecedent debt, he was not a holder of them for value. The master further held in that case that the true subject of the pledge was, not shares of stock, but a right to be indemnified for the fraudulent acts of the company's officers, and, even conceding that the plaintiff had an interest in the stock, to that extent it passed to Jeanes & Co. when they advanced money on the faith of the stock, and that it was fully asserted and availed of by them. The master also held that the new shares issued to Jeanes & Co. were lawfully disposed of by them under powers contained in the pledge, without liability to account to Elbert, and he therefore recommended a decree dismissing the plaintiff's bill. On exceptions filed, the master's report was overruled by the common pleas, and the plaintiff was held to be entitled to a recovery.

While the record of that case was in that condition the present case came before the same master, and in obedience to the decree of the court in the Jeanes case he declined to sustain his own views, but reported that the plaintiff was entitled to a decree, because the court of common pleas had so decided in the case of Jeanes. Since then, however, this court sustained the master's report in that case, and reversed the decree of the common pleas: *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624. We, however, then considered but the one question of the power of the pledgees to sell the pledge and the lawfulness of its exercise. That question does not arise in this case, as the pledgee here still holds the new shares of stock issued

to him in exchange for the false shares received from Elbert.

Upon a present examination of the report of the master in the *Jeanes* case we fully approve the views expressed by him as to the true character of the pledge. It was not a pledge of shares of stock, but simply of a right to receive indemnity for the fraudulent acts of the officers of the railway company in issuing the spurious shares. The master, in thus regarding the subject, simply followed the ruling of this court in the case of *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513, in which Sharswood, C. J., speaking of the right of the pledgees of certain other false shares of the stock of this same West Philadelphia Passenger Railway Company by the same John S. Morton and other officers of the company, said: "Their claim on the company was not, indeed, on the stock. It was a claim to be indemnified for the fraudulent acts of the officers of the company from which they allege that they have suffered damage." In the original proceeding in the suit of *Swain v. West Philadelphia Passenger R'y Co.*, the master based his report upon the proposition that "the liability of the railway company arises on the principle of estoppel which the necessities of trade and commerce require. Stock certificates issued by a corporation having power to issue are a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon, and claim the benefit of an estoppel in his favor as against the corporation"; citing *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Willis v. Derby R'y Co.*, 6 Week. Not. 461; *In re Bahia and San Francisco R'y Co.*, L. R. 3 Q. B. 585; *Bank of Kentucky v. Bank*, 1 Pars. Cas. 180. Undoubtedly this is the correct principle upon which to administer relief in all such cases.

This being so, it will be seen at once that the right to relief depends upon the equity of the person claiming it. If he has expended money upon the faith of the official certificates of the officers of the company, he has a right to be indemnified to the extent of his expenditure against loss from false certificates, but only because of the fact of his expenditure. The false certificates are no certificates in legal contemplation, and give no rights of their own force. But the act of the officers in issuing them having been accepted and acted upon by another, the company cannot be heard to deny the truth of the fact represented. It is simply the application of the principle

well expressed in *Freeman v. Cooke*, 2 Ex. 654, and *In re Bahia and San Francisco R'y Co.*, *supra*, that, "If you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact." But if what was pledged by Elbert to Kisterbock was not shares of stock but a right to indemnity on account of a good-faith advancement of Kisterbock's own money, made by Kisterbock himself, it is difficult to understand upon what principle the plaintiff is entitled to any recovery upon any view of the facts of this case. There is no finding on this record that Elbert ever owned or bought or paid a dollar of money for these particular shares of stock. They were not even *prima facie* his, as they were issued in the names of other parties, and were transferred into the name of Kisterbock immediately after he received them. Elbert was himself examined and cross-examined as a witness at great length. But he gave no testimony as to his acquisition of these particular shares which were delivered to Kisterbock, nor to any of the facts of the transaction. He said he received very many shares from Morton; that those he received in 1870 were as security for the indebtedness due him by Morton, and that he also received shares upon which to borrow money for Morton. He had no written pledge of any of the shares, nor could he state any oral pledge of the same. At the end of a long examination on this subject, he was asked: "Q. Then all the pledge that ever was made, there being no written pledge, orally, was by giving stock in the way that the stock was given? A. Yes, sir." In answer to another question, he said: "I held all that stock as collateral for indebtedness to me." This was 2,567 shares, including the 300 of Kisterbock, and all designated in a letter of January 11, 1877, from Morton to him.

There is no finding that Elbert ever advanced any money on the shares delivered to Kisterbock, either to Morton or to any one else. There is not even a finding that they were delivered to Elbert as security for an antecedent indebtedness due by Morton to him, or even that there was such indebtedness. But if there had been such a finding, or if such had been the fact, Elbert would not have been entitled to any relief on that account as against the company, because, in that event, Elbert parted with nothing on the faith of the certificates, and he would fail to bring himself within the principle upon which alone indemnity could be given, or was in fact given, when

the decree was made in the case of Swain *et al.* against the company. Even granting that because Elbert gave his own notes for the money borrowed from Kisterbock, and therefore had an interest equal in extent to that of the latter, it was the advancement of money, and not the giving of notes, which conferred the right to indemnity, and all the relief that could be given or was given for that cause was actually and properly given to Kisterbock.

There could not be a right to indemnity to Kisterbock, and a further right to indemnity to Elbert, arising out of the same transaction. Most clearly, Kisterbock was entitled to it, but when it was given to him equity was satisfied; the subject was exhausted. Elbert could suffer no injury on account of the notes, because Kisterbock held them, and he having accepted the new shares in full payment of the debt for which the notes were given, of course could recover nothing from Elbert. Kisterbock had the alternative of accepting seventy-five dollars per share in money for the false shares, or instead thereof three hundred new and genuine shares. Had he accepted the money, it would have been an end of the matter, and the present case would never have been heard of. But he chose to accept shares instead of money. Why should there be any difference to him in the result of his accepting one or the other of the alternatives? What he took, and what he had a right to take, was indemnity,—such indemnity as the law could give him. But it was his, not Elbert's; his absolutely, not conditionally. It was personal to himself, not because of the certificates which he received from Elbert, but because he, as an individual, had parted with his own money upon the faith of certifications made by the officers of the company, the truth of which certifications the company could not be permitted to deny as against Kisterbock. This was something which never belonged to Elbert, and which he never passed to Kisterbock. If Kisterbock had never advanced the money, he would never have held this right to indemnity, even though he might have held the false certificates.

It follows that the trust which is a quality of pledge, and goes with it ordinarily, did not go with and never attached to this right to indemnity. It was a right which only came into existence in favor of Kisterbock, not by force of the pledge, but by force of his good-faith advancement of his own money. It was never clogged with any trust in favor of Elbert, because the fact upon which alone it was founded had no existence

with Elbert, or in his favor, or in consequence of any money or property parted with by him. It was the money which Kisterbock parted with which created the right to indemnity, and that money was his alone, and its advancement was the sole basis upon which the decree was made in the original case. These views are radical, and reach to the very foundations of the plaintiff's claim of title to equitable relief. They are in hostility with such claim, and require a reversal of the case upon its ultimate merits.

The decree of the court below is reversed, at the cost of the appellee, and the bill is dismissed, with direction that all the costs of the case be paid by the plaintiff.

RIGHTS OF PLEDGER OF FRAUDULENT STOCK CERTIFICATES — Where one who has fraudulent stock pledges it for collateral security to secure loans upon notes executed by him, authorizing the pledgee to sell the same upon non-payment of the notes, and the pledgee, having procured genuine stock from the corporation in lieu of the fraudulent stock pledged, upon the non-payment of the notes sold the stock, the sale divested the pledgor of his interest therein: *Jeane's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624.

HAYES v. PRESS COMPANY, LIMITED.

[127 PENNSYLVANIA STATE, 642.]

LIBEL. — **WRITTEN OR PRINTED WORDS** which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous.

LIBEL. — **OFFICE OF INNUENDO** is to aver the meaning of the language published; but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as surplusage.

LIBEL — **QUESTION FOR JURY**. — Where a newspaper publication under the head-line "Hotel Proprietors Embarrassed," stating that judgment has been entered against the hotel proprietors on a note payable on demand, is alleged to be libelous, with an innuendo that the meaning of such publication was, that "plaintiff was in bad circumstances, insolvent, and unworthy of credit," it is for the jury to say whether the publication meant what is alleged in the innuendo; and if they find that it did, the publication is libelous.

LIBEL — **PRIVILEGED COMMUNICATION**. — A publication in a newspaper under the head-line "Hotel Proprietors Embarrassed" that judgment has been entered against them on a note payable on demand is not privileged, but is libelous.

Richard P. White and George H. Earle, Jr., for the plaintiff in error.

James H. Shakespeare and James H. Heverin, for the defendant in error.

STERRETT, J. The evidence in this case tended to show that after the plaintiff had been engaged for some time in the retail drug business, he purchased the furniture, etc., of the St. George Hotel, Philadelphia, and leased the building itself for a term of five years from September 7, 1885. During the first year the hotel business showed a net profit of about eight thousand dollars, with favorable prospects for the next ensuing year. The house was largely patronized by guests who made it their home during the year, except for a few weeks in the summer.

In August, 1886, plaintiff determined to make some needed repairs, such as painting, papering, etc., involving a greater cash outlay than he was then prepared to meet without a temporary loan. For that purpose he had a note for fifteen hundred dollars at four months, indorsed by his brother, discounted by the Third National Bank, with which he kept an account; and, as collateral security therefor, he gave the joint judgment note of himself and brother for same amount, payable on demand, with the understanding that the latter should be used only in case the discounted note was dishonored. By an oversight of the bank, judgment was prematurely entered on the collateral note, but no execution was issued thereon. The Press Company, Limited, defendant, in its issue of August 9, 1886, published the following notice of the judgment:—

“Hotel Proprietors Embarrassed.

“A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note, dated August 6th and payable on demand, for fifteen hundred dollars.”

This article constitutes the alleged libel, and is declared on with the following innuendo: “Thereby then and there meaning that the said J. F. Hayes, the plaintiff, was in bad circumstances, insolvent, and unworthy of credit.” Defendant’s demurrer to the declaration being overruled, the plea of not guilty was entered, and on that issue the case was tried.

In addition to the facts and circumstances above stated, the evidence adduced by plaintiff tended to show that he was not embarrassed, nor in bad circumstances, insolvent, nor unworthy of credit, at the time the judgment was entered, nor before; that in round figures his entire liabilities, including

drug and hotel business, aggregated about sixteen thousand dollars, and his assets about thrice that sum; that none of his liabilities were pressing, and a very small proportion of same then due. His object in borrowing the fifteen hundred dollars was to provide better accommodations for patrons of the hotel. Plaintiff himself was examined and rigidly cross-examined as to his business affairs, financial condition, etc. His testimony tended to show that the publication was prejudicial to his financial standing, and injurious to his business as proprietor of the hotel. The manner in which it affected both, and the extent of the alleged injury, were stated in detail, and need not be further noticed. The evidence was all for the consideration of the jury in determining questions of fact upon which it was their exclusive province to pass. The hotel books were produced on defendant's call, but it does not appear that they were examined or put in evidence, nor was there any rebutting testimony offered by defendant.

If there was no error in the trial, the verdict for defendant should not be disturbed; but it is alleged the court erred in several particulars, some of which are worthy of notice.

In plaintiff's first and fourth points for charge, the learned judge was requested to instruct the jury as follows: "1. If you believe plaintiff's innuendo to be true, your verdict should be for plaintiff." "4. This publication was not a privileged communication." In his answer to the first, the learned judge said: "I have answered that point already in my general charge. That point I cannot unqualifiedly affirm."

We fail to discover in the general charge any such affirmation of the point, qualified or otherwise, as the publication itself and the undisputed evidence required. It was for the jury to say whether the publication meant what is alleged in the innuendo. If they found it did, the publication was libelous; and, under the uncontradicted evidence, plaintiff was entitled to a verdict. Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency or even embarrassment, are libelous. The law carefully guards the credit of merchants and traders. Imputations on their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable: *Odgers on Libel and Slander*, 19, 29, 80, 81, and authorities there cited.

In its application to a man's financial condition or standing, the word "embarrassed," employed in the head-line of the

article complained of, ordinarily means encumbered with debt, beset with urgent claims and demands, unable to meet his pecuniary engagements, etc.,— words of substantially the same import as those used in the innuendo. The office of an innuendo is to aver the meaning of the language published; but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and if used, may be treated as useless surplusage. Considered in connection with the rest of the article, the word “embarrassed” means substantially what is ascribed to it in the innuendo. That, however, was a question for the jury. The point should have been affirmed.

In his answer to the fourth point, above quoted, the learned judge said: “I have defined in my charge how far it is privileged, by telling you that a fair comment was admissible, but that an unfair and reckless comment was not admissible. This would take away the privilege.” This answer, we think, was misleading and erroneous. Strictly speaking, the question of privilege was not involved. It was the common right of any one to publish the fact that a judgment for fifteen hundred dollars had been entered against the defendants, substantially as shown by the record of the court in which it was entered; but it was neither the right nor the privilege of defendant, or any one else, to publish in connection therewith the declaration, in the form of a head-line, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business; and if the evidence is believed, it did injure plaintiff’s credit and business as a hotel-keeper. Such a declaration, whether it be regarded as an inference drawn by the writer from the fact that the judgment was entered, or be called a comment on a judicial proceeding, was an unwarranted assertion of fact, which, if untrue, was manifestly calculated to impair plaintiff’s credit and injure his business. It does not follow that one who authorizes a confession of judgment against himself is financially embarrassed. The publication, as a whole, including the head-line, was in no sense privileged. The point should have been affirmed.

For reasons already suggested, those portions of the charge recited in the second, fourth, and fifth specifications were misleading and erroneous.

The testimony elicited on cross-examination of plaintiff

was irrelevant and improper, and for aught that we know, it may have prejudiced plaintiff's case.

The remaining specifications of error are not sustained; but for reasons suggested in connection with the first, second, fourth, fifth, seventh, and eleventh specifications, the judgment should be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

LIBEL, WHAT IS. — False statements made concerning a man's financial condition are libel: *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77, and note; compare *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768. So publications impeaching the professional or business standing of a person are libelous: *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Obaugh v. Finn*, 4 Ark. 110; 37 Am. Dec. 773.

LIBEL — INNUENDO. — The office of the innuendo is to aver the meaning of the language published, and if the meaning is plain, no innuendo is needed: *Bourrescau v. Detroit Evening Journal Co.*, 63 Mich. 425, 6 Am. St. Rep. 321, and particularly cases cited in note. Where the language is libelous, and fairly susceptible of the meaning claimed for it by the plaintiff, it is proper to aver in the complaint the meaning thereof as intended by the defendant in making the publication, and as understood by those who read it: *Petsch v. Despatch Printing Co.*, 40 Minn. 291.

LIBEL A QUESTION FOR THE JURY. — Where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine its character as to being actionable or not actionable, it is then a question for the jury, under proper instructions, to find its significance: *Bourrescau v. Detroit Evening Journal Co.*, 63 Mich. 425; 6 Am. St. Rep. 321, and cases cited in note; note to *Van Vechten v. Hopkins*, 4 Am. Dec. 351, 352; *Rodgers v. Kline*, 56 Miss. 808; 31 Am. Rep. 389. Where an article is not ambiguous, the question of its meaning is for the court; but where a portion of an article is selected and declared upon, and its meaning is ambiguous, then the question is for the jury: *Mosier v. Stoll*, 119 Ind. 245.

NEWSPAPER LIBEL: See note to *McAllister v. Detroit Free Press*, 15 Am. St. Rep.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. ALEXANDER.

[80 SOUTH CAROLINA, 74.]

CRIMINAL LAW — MURDER. — An assault and battery inflicted with a designed intent, and resulting in death, is murder. A formed design to take life is not necessary to make the killing murder.

CRIMINAL LAW — INSANITY AS A DEFENSE — BURDEN OF PROOF. — Where insanity is made a defense, the question whether the defense is sustained or not depends upon the preponderance of evidence for or against, but the state, in such case, need not establish sanity beyond all reasonable doubt.

CRIMINAL LAW — MURDER. — **IRRESISTIBLE IMPULSE TO KILL** cannot be set up as a defense to murder so long as the accused knew that the act he was committing was a crime morally, and punishable by the law of his country. Such knowledge makes it imperative that he shall control himself at his peril.

CRIMINAL LAW — MURDER — INSTRUCTIONS. — A charge is not erroneous which states that where the killing is proven, and no more, the law will imply malice and make the act murder; but when all the facts and circumstances of the killing are in evidence, then the jury must say from the testimony what was the intention with which the act was committed.

Child and Carey, and J. E. Boggs, for the appellant.

J. L. Orr, for the respondent.

SIMPSON, C. J. The defendant was indicted and tried at the July term of the court of general sessions, 1888, for Pickens County, for the murder of his wife, Jane Alexander. He was convicted, and now appeals upon exceptions to his honor's charge to the jury, alleging error both as to matters charged and in refusals to charge.

The two first exceptions impute error, because his honor declined to charge, as requested, that in order to constitute murder, the testimony must satisfy the jury that there was a premeditated and formed design to take life on the part of the accused before the commission of the act, and that the killing took place under this premeditated and formed design. His honor, declining to charge as requested, charged that "murder was the killing of a human being with malice aforethought. Malice does not consist alone of a formed design to kill another. For instance, one man meets another on the street and an altercation ensues, and raises a cane for the purpose of striking him, and strikes the blow and death ensues; that is murder. He may not have formed a design to kill him, but to strike, and in striking him killed him; that is murder. That is the difference between the request and my view. All that is necessary is that he should have conceived the design to commit an assault upon him, or an assault and battery upon him, and in consequence of that he dies. That is murder, whether he meant to kill him or not. A formed design to take life is not necessary to make a killing murder."

In other words, the substance of his honor's charge was, that murder might be committed, as the result of some illegal act, whether the design to take life was actually present or not. This was in accordance with the common law as found in Blackstone, where he says: "And in general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount only to manslaughter."

2. His honor was requested to charge that where insanity is raised as a defense by evidence engendering a doubt, it devolves upon the state to remove this doubt, and to establish the sanity of the accused beyond all reasonable doubt. This was declined, and very properly; because insanity is a defense, and whether sustained or not, must, like any other defense, depend upon the preponderance of testimony for or against, weighed and balanced by the jury after it is all out; *State v. Paulk*, 18 S. C. 515; *State v. Coleman*, 20 Id. 452; *State v. Bundy*, 24 Id. 439; 58 Am. Rep. 263.

3. His honor was requested to charge "that if by reason of mental derangement at the time of the act the prisoner had

not power to control the disposition or impulse to commit the deed, he should be acquitted." It seems that the effort here was to get the judge to announce the doctrine of irresistible or uncontrollable impulse as distinguished from insanity; that a person, though not absolutely insane, or demented to the extent of not knowing the difference between right and wrong, or not incapable of knowing the moral character of an act, yet might be led on by an uncontrollable impulse to commit the deed charged, and therefore he should be held irresponsible if committing it under such circumstances. His honor declined to make such charge to the jury; on the contrary, he charged that mere mental weakness was not sufficient to exempt one from responsibility; that it required insanity, and insanity to the extent of destroying a knowledge of the wrongfulness of the act, morally and legally, before exemption could be plead; that irresistible impulse could not be interposed as long as the accused knew that the act which he was committing was a crime morally, and punishable by the laws of his country; that such knowledge made it imperative that he should control himself at his peril. Without going further, we think his honor's charge was in accordance with the doctrine laid down in this state in the case of *State v. Bundy*, 24 S. C. 445, 58 Am. Rep. 263, where this court sustained the circuit judge in holding that the true test of responsibility was knowledge "that the act committed was wrong, or criminal, or punishable, either the one or the other"; because, said the circuit judge, "notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act, as to its being morally or legally wrong, he is still responsible for his act, and punishable as if no mental disease existed at all." This court said: "We cannot say that this was error of law."

His honor charged "that where the killing is proven, and no more, the law will imply malice, and make the act murder; but when all the facts and circumstances of the killing are in evidence, then the jury must say from the testimony what was the intention with which the act was committed. Then it becomes a matter of proof,—no implication any longer." And this was excepted to as error. We see no error in it, certainly none of which the prisoner could complain; on the contrary, it was as favorable to him as the law allowed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MURDER — INSANITY AS A DEFENSE — BURDEN OF PROOF. — When insanity is set up as a defense in a criminal case, it must be established to the complete satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt as to the defendant's sanity, raised by all the evidence, does not justify an acquittal: *Parsons v. State*, 81 Ala. 577; 60 Am. Rep. 193, and extended note 212-225, as to the burden of proof in criminal cases where insanity is pleaded as a defense. But it has been held that, although insanity as a defense must be shown to the satisfaction of the jury by clear proof, if the jury entertain a reasonable doubt as to the defendant's sanity, they should acquit him: *State v. Marler*, 2 Ala. 43; 36 Am. Dec. 398, and note 410, 411, as to the burden of proof in such cases. A defendant who relies upon insanity to excuse homicide must establish it by a preponderance of evidence; and it must appear that at the time of the killing he was so affected by insanity as to render him incapable of distinguishing between right and wrong; or that, although he knew the consequences of his acts, he was wrought up to such a frenzy by his insanity that he was unable to control his actions: *Williams v. State*, 50 Ark. 511; *State v. Mowry*, 37 Kan. 369. The burden of proof is upon him who alleges insanity, because the legal presumption is that all men are sane: *Miller v. Rutledge*, 82 Va. 863.

CRIMINAL LAW. — The question of the sanity of a defendant can be tried by a special jury or by the same jury which passes upon the crime for which he is under indictment. The rule is, that the question of insanity at the time of the commission of the crime must be tried by the jury which tries for the criminal act: *Webber v. Commonwealth*, 119 Pa. St. 223; *State v. Gould*, 40 Kan. 258; but the question as to a defendant's insanity at the time of the trial may be tried either by the court or a special jury for that purpose: *Webber v. Commonwealth*, *supra*; *State v. Peacock*, 50 N. J. L. 34.

INSANITY DISTINGUISHED FROM PASSION. — A man of sound mind cannot avoid responsibility for his acts because they were committed under the impulse of such passion as temporarily dethroned his reason, or caused him to temporarily lose control of his will: *Williams v. State*, 50 Ark. 511.

MURDER. — Malice is one of the necessary ingredients of the crime of murder; and malice may be defined as the absence of legal justification, excuse, or extenuation in the commission of an unlawful act: *Cribbs v. State*, 86 Ala. 613; or the settled purpose or intention of seriously injuring or destroying the life of another: *Cahs v. State*, 27 Tex. App. 709. And though a killing, to be murder, must have been done with "malice aforethought," still such malice need not have existed any considerable length of time prior to the killing; for if it exists for any time, however short, before the act, it is malice aforethought in law: *Cook v. State*, 77 Ga. 96. "Deliberation and premeditation" are elements of the crime of murder in the highest degree: *Fallin v. State*, 83 Ala. 5; *Beers v. State*, 24 Neb. 614; *People v. Williams*, 73 Cal. 531; note to *State v. Landgraf*, 6 Am. St. Rep. 31. And "premeditatedly" means "thought of before, however short": *State v. Landgraf*, 96 Mo. 97; 6 Am. St. Rep. 26; *Cleveland v. State*, 86 Ala. 1; *Carter v. State*, 22 Fla. 553. "Deliberation" means "done in a cool state of blood, and not in the heat of passion engendered by a lawful or just provocation: *State v. Landgraf*, *supra*; *Cleveland v. State*, *supra*.

STATE v. CARROLL.

[80 SOUTH CAROLINA, 85.]

CRIMINAL LAW — ADULTERY. — Under a statute defining adultery to be “the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person,” it is proper to charge that, to constitute the crime, where the parties are not charged as living together, the testimony must satisfy the jury, beyond a reasonable doubt, that the criminal intercourse was habitual, — that is, frequent; and that occasional acts will not be sufficient; and it is also proper to decline to define “habitual carnal intercourse,” leaving it to the jury to say how frequent the acts must be to make them habitual.

CRIMINAL LAW — ADULTERY. — Where two are jointly indicted for adultery, and only one is arrested, that one may be legally tried and convicted alone.

CRIMINAL LAW — EVIDENCE — DURESS. — Where resolutions are passed at a public meeting, and presented to the accused before his arrest, by persons other than officers of the law, and in response thereto he writes a letter under protest, such letter is not obtained by duress, and is admissible in evidence as an admission of guilt of the crime charged.

CRIMINAL LAW — ADULTERY — INDICTMENT. — Under a statute defining adultery to be “the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman,” etc., the omission from the indictment of the words “without living together” does not vitiate it.

Izlar and Glaze, for the appellant.

W. St. J. Jervey, for the respondent.

McIVER, J. The appellant was indicted jointly with one Laura Smoak for adultery, the charge in the indictment being “that the said Daniel J. Carroll and Laura Smoak . . . did unlawfully and habitually have carnal intercourse with each other, he, the said Daniel J. Carroll, being then and there a married man, and she, the said Laura Smoak, then and there being unmarried,” etc.

At the call of the case, the solicitor announced that the defendant Laura Smoak not having been arrested, he would proceed with the trial of Carroll. Counsel for appellant objected unless both defendants were put on trial, the offense being joint, and the two being jointly indicted. The objection was overruled, and the court proceeded with the trial of appellant alone.

It seems that a number of the citizens of St. Matthews, where appellant resided, impressed with the belief that he was practicing adultery with said Laura Smoak, assembled in public meeting and passed resolutions, which are set out in the

record, demanding that appellant leave the town of St Matthews within a prescribed time, on pain of an indictment for adultery, and such further action as might be deemed necessary. These resolutions, signed by forty-one citizens, were communicated to the appellant, who replied by letter, likewise set out in the record, in which he pledged himself to abandon, at once and forever, all connection with Laura Smoak. Amongst other evidence offered at the trial, these resolutions were offered, and the appellant objected, and the objection was overruled by the court in these words: "Not on the ground that the facts stated in the resolutions would thereby be put in evidence, but because they contain a charge of adultery against the defendant, and defendant's reply could only be known when the precise nature of the charge appeared; and when the charge was in writing, the rules of evidence ordinarily required the production of the writing." The solicitor, however, seeming impressed by defendant's objection, did not then put the resolutions in evidence.

At a subsequent stage of the case, appellant's letter in reply to the resolutions was offered in evidence by the solicitor, which, upon objection on the part of the defense, was ruled admissible, the court saying: "In order to constitute duress, the party must be either under arrest, or some language must be used to induce him to believe that it would be better for him to confess, or he must be in such immediate danger of imprisonment, that being the ground of duress, that he is presumed in law not to be a free agent. Here there was no immediate danger of arrest, neither was the party under arrest." What then occurred, as stated in the case as settled by the circuit judge, is as follows: "The letter was then put in evidence; whereupon counsel for defendant requested the solicitor to put in also the resolutions to which the letter was an answer, which was done, no objection made." In the argument here, the counsel for appellant, while, very properly, recognizing the fact that he is bound by the case as settled by the circuit judge, insisted, in justice to himself, that he is incorrectly represented as requesting that the resolutions be offered in evidence, and we can very well understand how this may be so. But, as will be seen under the view which we take, it makes no difference which version of what occurred is the correct one.

At the close of the testimony, the case was submitted to the jury under the charge of the circuit judge, and a verdict of

guilty having been rendered, defendant, upon the minutes, moved for a new trial, and in arrest of judgment, which motions were refused, and the defendant was sentenced to pay a fine of two hundred dollars, or be imprisoned in the state penitentiary, at hard labor, for the period of six months. Thereupon defendant appealed upon the several grounds set out in the record.

The first ground imputes error to the circuit judge in refusing to charge as follows: "That to establish the crime of adultery, where the parties are not charged as living together, the testimony must satisfy the jury, beyond a reasonable doubt, that the criminal intercourse was habitual,—that is, frequent; occasional acts will not be sufficient." In response to this request, the circuit judge said: "I charge you that is the law, except that I decline to charge you what habitual is. I charge you that it is not occasional; but how frequently it must be committed to make it habitual, I leave to your discretion. I am not prepared to say how often the act must have been committed, nor how nearly together those acts must occur, in order to constitute habitual carnal intercourse. That is for you. I charge you that it is not occasional, but habitual. With that modification, I charge you that request." From this statement, it seems to us quite clear that the circuit judge did charge precisely as requested,—that to constitute the offense charged, the carnal intercourse must be habitual,— "that is, frequent; occasional acts will not be sufficient." He adopted the very language of the definition of the word "habitual," as presented in the request,—that is, frequent, not occasional. The fact that he went on to say that he could not undertake to tell the jury how frequent the acts of carnal intercourse must be, or how near together they must occur, in order to constitute habitual intercourse, was really no modification of the request, which was charged explicitly in the very language selected by the appellant.

The second and third grounds of appeal impute error to the circuit judge in declining to define the terms "habitual carnal intercourse," as used in the statute, and leaving the interpretation of those terms to the jury. The language of the statute, as found in section 2589 of General Statutes, is as follows: "Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person." Un-

der this statute, adultery may be committed in either one of two ways: 1. Where a man and woman, one of whom is married to another person, live together in carnal intercourse; 2. Where, not living together, they indulge in habitual carnal intercourse; and the indictment in this case falls under the second head. It will be observed that the statute does not undertake to define either the word "habitual" or the word "carnal," and their meaning must be determined by the common sense of mankind; and in the absence of any statutory definition, it would be very difficult, if not absolutely impossible, to define with any greater precision the terms "habitual carnal intercourse" than was done by the circuit judge in this case, — that it must be frequent, and not occasional; but how frequent to make it habitual must be left to the common sense of the jury.

What are the habits of a person must necessarily be a question of fact. For example, where the question is whether a person is habitually intemperate, or whether he is a person of temperate habits, is mainly a question of fact, and is not susceptible of being defined with precision as matter of law. As was said by Mr. Justice Field in *Knickerbocker Ins. Co. v. Foley*, 105 U. S. 354, "when we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts"; but neither he nor any other judge, so far as we know, has ever undertaken to say how frequently the act in question must be repeated in order to generate a habit of doing such act. So in the case of *State v. Hathcock*, 20 S. C. 419, 47 Am. Rep. 842, where a laborer, employed in working upon the road-bed of a railroad used in transporting the mail, passengers, and freight, was indicted for failing to work on a public highway, and interposed as his defense the fact that his employment constituted a "justifiable excuse," which was overruled, this court held that there being no definition of what was a justifiable excuse in such cases, it could not be said there was any error of law in the ruling below. The chief justice, in delivering the opinion of the court, uses this language, which, it seems to us, is applicable to the question under consideration: "The difficulty in this case is, that we find no law, either statutory or otherwise, declaring what facts will constitute a justifiable excuse in cases like these, and, consequently, we have no rule by which to test the facts relied on by the appellants, and to determine whether or not, as matter of law, they

make out a justifiable excuse." So here we may say that we find no law defining the terms "habitual carnal intercourse," and hence, even assuming that the circuit judge declined altogether to define those terms, we cannot say that there was any error of law in omitting to do that which the law had failed to furnish him any means of doing.

The fourth ground of appeal imputes error to the circuit judge in overruling appellant's objection to being tried in the absence of his co-defendant, the offense being joint and the two being jointly indicted. Certainly, the fact that these two parties were jointly indicted is not sufficient to forbid the trial of one without the presence of the other; for this would lead to the extraordinary (not to use any harsher term) result, that where two or more persons commit any crime, however atrocious it may be, for which they are jointly indicted, the escape of one by eluding arrest affords absolute immunity to all the rest. The books, however, are full of cases which show that the law is not subject to such a reproach. We cannot think, therefore, that the distinguished counsel for appellant lays any stress upon the fact that these two parties were jointly indicted, but must suppose that he bases this ground rather upon the fact that the offense charged is of such a nature as that it cannot be committed by one person, but must necessarily be participated in by another, and hence it is necessary that the two must be tried together, as neither one alone can commit the offense charged.

The authorities show that this position cannot be sustained. In *Commonwealth v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248, it was held that on an indictment against a man and a married woman for adultery, the man alone may be convicted, although the woman was too drunk to consent to the intercourse, and could not, therefore, be convicted. If this be so, then, surely, either party might be tried alone. So in *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, it was held that, under an indictment for incest, similar in this respect to adultery, one party having knowledge and the other being ignorant of the relationship, the former may be convicted and the latter acquitted. Again, in *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207, where the authorities are reviewed, it was held that where the parties were jointly indicted for adultery and severed on the trial, the woman being tried first and acquitted, that did not operate as an acquittal of the man, and his plea in bar on that ground was overruled. It appears

from the opinion in that case that there are two cases in North Carolina which hold the contrary, though the weight of authority is the other way. But the North Carolina cases concede that the parties may be tried separately.

In our own state we have no authority, so far as we are informed, directly on this point, but we have cases which, in principle, it seems to us, are strictly analogous. Although it requires the co-operation of at least three persons to commit a riot, yet from the case of *State v. Thackam*, 1 Bay, 353, followed by the cases of *State v. Calder*, 2 McCord, 462, *State v. Jackson*, 1 Speers, 13, down to the case of *State v. Blair*, 13 Rich. 93, it has uniformly been held that a white person with two or more slaves may commit a riot, and as the court of general sessions did not then have jurisdiction of offenses committed by slaves, the white man might be tried alone by that court. Now, if the court of sessions could try a white man alone for a riot committed with the co-operation of his slaves, over whom that court had no jurisdiction on account of their status, we see no reason why the court in this case could not try the appellant alone when it had not acquired jurisdiction of his *particeps criminis*, she never had been arrested.

The point raised by the fifth ground of appeal is disposed of by what we have said in considering the fourth ground.

The sixth and seventh grounds, which complain of error in receiving in evidence the resolutions of the public meeting and the appellant's letter in response thereto, may be considered together. Indeed, so far as the sixth ground is concerned, the case, as settled by the circuit judge, which is of course conclusive here, precludes the appellant from raising the question as to the admissibility of the resolutions; for it there appears that they were put in without objection. But as the counsel for appellant seems so earnestly impressed with the conviction that injustice (unintentional, of course) has been done him in representing that he assented to the introduction of the resolutions in evidence, we will consider the question as if the objection had been interposed at the proper time.

We do not suppose there can be a doubt that if the persons composing the public meeting, or some of them, had gone to the appellant and verbally made to him the statements embodied in the resolutions to which he had verbally replied in the terms of his letter, it would have been competent to prove what passed between the parties, provided the statements made

by defendant were not extorted from him by something amounting to the legal idea of duress. If so, then we are unable to perceive why the communications which happened to be in writing should not be quite as good, if not better, testimony than the verbal statements.

The question then recurs, whether the letter was extorted from appellant by duress. The circuit judge has found that it was not, and we think the testimony fully sustains his finding. The appellant was not under arrest at the time, and none was then threatened. The parties to whom the communication was made were not shown to be officers of the law; and when we find that he made the same admission in a more pointed and distinct form to his brother-in-law, who it is not pretended practiced any coercion, either by exciting his hopes or fears, we cannot doubt that the letter was not extorted from the defendant by the use of any such means as would forbid its introduction in evidence.

In the argument here, counsel for appellant has raised another question, which, though not presented by any of the grounds of appeal, he claims to be a question of jurisdiction, which may be raised at any time. The point, as we understand it, is, that inasmuch as the indictment fails to charge that the defendants were guilty of habitual carnal intercourse with each other "without living together," there is no charge of any criminal offense of which the court could take jurisdiction. This, it seems to us, raises rather a question as to the sufficiency of the indictment than a question of jurisdiction. The indictment purports to charge the offense of adultery, of which the court below unquestionably had jurisdiction; and if the charge is defectively made, the objection should have been taken by motion to quash the indictment, or by a motion in arrest of judgment, and not by a plea to the jurisdiction of the court. So far as the record shows, no such objection was taken in the court below, and the question whether there is any defect in the indictment is not, strictly speaking, properly before us.

It is stated, however, in the case, that a motion in arrest of judgment was made, and overruled by the circuit judge, and though the ground of such motion does not appear, we are willing to assume, in favor of liberty, that it was upon the ground that the words "without living together" were omitted from the indictment. In *State v. Padgett*, 18 S. C. 321, it is said: "The rule in regard to indictments framed to cover offenses created by statute is, that the offense should be set

forth with clearness and certainty, and must be so described, if not in the very words of the statute, as to bring it substantially within the provisions of the statute." Under this rule, and especially under the cases cited to support it, we think it clear that the omission from the indictment of the words "without living together" does not vitiate the indictment. They do not constitute any one of the elements of the offense denounced by the statute. The offense consists in "habitual carnal intercourse" between a man and a woman, one of whom is lawfully married to another person, whether they live together or not; and those words were inserted in the statute simply for the purpose of avoiding any inference, which might otherwise have been drawn from the preceding words of the statute, that the offense would not be complete unless the parties lived together. As is said by O'Neill, J., in *State v. Schroder*, 8 Hill (S. C.), 64, the omitted words "do not enter into the statutory definition of the offense; they are merely descriptive of the persons by whom the offense may be committed." See also *State v. Cunningham*, 2 Speers, 254, where similar language is used, by the same eminent judge, in reference to the omission of the words, "any person resident in or being a citizen of this state," found in the dueling act, from an indictment under that act. It seems to us, therefore, that the objection could not have been sustained, even if made the basis of a motion in arrest of judgment.

The judgment of this court is that the judgment of the circuit court be affirmed.

ADULTERY. — WHAT CONSTITUTES THE CRIME OF "LIVING TOGETHER IN ADULTERY": See *Smith v. State*, 86 Ala. 57; 11 Am. St. Rep. 17; *Bodiford v. State*, 86 Ala. 67; 11 Am. St. Rep. 20, and note; *Bird v. State*, 27 Tex. App. 635; 11 Am. St. Rep. 214, and note 216. To convict of the crime of "lewdly and lasciviously associating and cohabiting together," under the Florida statutes, evidence showing a dwelling or living together as if married must be given; and a single act of incontinency is insufficient, or even occasional acts, to prove such crime: *Luster v. State*, 23 Fla. 339.

ENTER v. QUESSE.

[30 SOUTH CAROLINA, 123.]

SET-OFF AND COUNTERCLAIM. — A defendant cannot set up as a counterclaim a claim purchased by him after the commencement of the action.

SET-OFF AND COUNTERCLAIM. — Defendant will not be allowed to interpose as a set-off or counterclaim, either at law or in equity, a claim against his creditor, bought up after action brought, and sought to be interposed on the ground of the insolvency of such creditor.

H. E. Young, for the appellants.

Buist and Buist, for the respondent.

SIMPSON, C. J. The plaintiff, respondent, instituted the proceedings below to enforce a mechanic's lien for the sum of \$205, on certain premises of the defendants Quesse and Greber, claiming priority over a mortgage of defendant Young. The defendants answered, denying plaintiff's claim.

The case was referred to the master. At the reference, on February 10, 1888, when the plaintiff closed his testimony, the defendants Quesse and Greber having entered upon the defense, but not closing, the reference was adjourned, and on February 27, 1888, these defendants gave notice that they would move to amend their answer in two particulars, the second of which was to set up, in a supplemental answer by way of equitable defense, a claim held by them against the plaintiff. This motion was made by these defendants upon an affidavit that said defendants, since the beginning of this suit against them, and after the filing of their answer thereto, had bought a claim against the said plaintiff, amounting to \$577.74, which they then owed; that the plaintiff was insolvent. This affidavit was not contradicted. The master overruled the motion, holding that the claim, not being in existence in favor of the defendants at the commencement of plaintiff's action, could not be set up.

Upon exceptions, his honor Judge Pressley concurred in the ruling of the master, holding, with him, that a counterclaim, to be available, must be one "existing in favor of defendant . . . at the commencement of the action," and saying: "In the matter of the equitable set-off craved by the defendants, my judgment is that said doctrine should not be so extended as to permit defendants to get advantage of other creditors, or to cast plaintiff in costs, or to defeat his right of homestead, if any exist; and some or all of these results might follow if defendants could set off against the plaintiff a

claim purchased by defendants after plaintiff's suit began." At the same time, the defendants moved, if there was doubt about the insolvency of the plaintiff, that the case be remanded to the master for additional testimony on that subject. This motion was also overruled.

The main questions raised in the appeal are: 1. Were the defendants Quesse and Greber entitled to set up this amount of \$577.74 as a legal counterclaim to the demand of plaintiff against them of \$205? 2. If not, could they set it up as an equitable set-off or counterclaim? It is contended by appellants, first, that, under the provisions of the code, they should have been allowed to set up their claim as an ordinary counterclaim, it being a matter arising on contract, and the action against them also arising on contract, although the claim of defendants was bought by them after the commencement of plaintiff's action, and even after answer had been put in, defending the suit upon other grounds.

It is conceded that, under the old practice, and before the adoption of the code, no claim of set-off arising under such circumstances would have been entertained or considered for a moment, it having been long since well settled that to entitle a debtor, when sued, to set off a claim against a suing creditor, said claim must have had existence in his favor at the commencement of plaintiff's action. It is urged, however, by appellants, that this matter is now regulated by our code, and that there is nothing express in the language of the code which denies to a defendant the right to set up such a claim as a counterclaim, the code in its terms only requiring that the alleged counterclaim should have existence at the commencement of plaintiff's action: See Code, sec. 171. This is true as to the language of the section referred to. But we think that this section must be construed under the light of the long-established principles of force on the subject of set-off before the adoption of the code, everywhere understood and enforced, both at law and equity, where set-offs were allowed: See *Shepherd v. Turner*, 3 McCord, 249; 15 Am. Dec. 631; *Bishop v. Tucker*, 4 Rich. 178-183; Waterman on Set-off, 381, where he says: "A debt cannot be set off in equity any more than at law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit," etc. In the state of New York, where the language of the code on this subject is precisely that of ours, there seems to be no question as to this matter. The counterclaim must be

not only in existence, but in existence in favor of the defendant interposing it, and at the time the action against him has been commenced. He cannot purchase it afterwards, and then set it up: See *Van Valen v. Lapham*, 13 How. Pr. 240; 5 Duer, 689. We think his honor's ruling, so far, was correct.

The appellants' attorney, however, urges earnestly that if this claim cannot be set up as a counterclaim under the provisions of the code, that still the defendants should be allowed to do so as an equitable set-off, founding the claim for equitable interference upon the insolvency of the plaintiff. Now, let it be admitted that plaintiff was, and is still, insolvent, can this position of appellant be sustained? Can this claim be set up as an equitable claim, contradistinguished from a legal counterclaim? It is true that in England, and before the adoption of the statutes of set-off, the court of chancery had assumed jurisdiction of the matter of set-off, and had made it a subject of equity jurisdiction in certain cases. For instance, in cases of mutual debts and credits connected with each other, as where the transactions or dealings constitute an account, consisting of receipts and payments, debts and credits, and where, consequently, the balance due only could be the debt between the parties, the court of chancery took jurisdiction, and allowed these debts and credits to be set off against each other and balanced, so as to find the actual amount due, instead of forcing the parties to sue at law upon their several demands. So, too, where the debts and accounts between the parties were unconnected, even if some peculiar equity intervened demanding a set-off, the court of chancery would enforce it as a matter of equity jurisdiction.

But in this latter class of cases there had to be something more than merely separate and opposing debts. There had to be some mutuality, this term being used in the sense of some relation or connection or dependence with and upon each other, as, for instance, a knowledge on both sides of an "existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it": *Ex parte Prescott*, 1 Atk. 231. This mutuality is explained by Judge Story as follows: If A should be indebted to B in the sum of ten thousand pounds on bond, and B should borrow of A two thousand pounds on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the two thousand pounds as an ulti-

mate set-off *pro tanto* from the debt of the ten thousand pounds; and if the bonds were both payable at the same time, the presumption of such a mutual credit would be converted into an absolute certainty. In such a case, the court of chancery would have decreed a set-off, even before the adoption of the statutes of set-off providing for unconnected debts being set off against each other.

And sometimes, too, a joint debt could have been set off in chancery against a separate debt, and conversely a separate debt against a joint one, but in all such cases antecedent to the statute allowing separate and unconnected debts to be set off the one against the other, the court of chancery, before it interfered, required the presence of, some peculiar and special equity demanding such interference, such as a mutual credit in the sense explained above. "Whenever there is a mutual credit between the parties," says Judge Story, "touching such debts, a set-off is upon that ground alone maintainable in equity, although the mere existence of mutual debts might not even in a case of insolvency sustain it. . . . But the mere existence of cross-demands will not be sufficient to justify a set-off in equity. Indeed, a set-off is ordinarily allowed in equity only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand; the mere existence of cross-demands is not sufficient" etc.: 2 Story's Eq. Jur., sec. 1433 b.

Now, what special equity do the defendants invoke here? They rely upon the insolvency of the plaintiff. This, we think, under the authorities, some of which have been cited by appellant, would have been sufficient, under the chancery rule above, to authorize the chancery court to decree a set-off, providing that the claim attempted to be set up had been in existence in favor of defendant when the plaintiff commenced action. In *Lindsay v. Jackson*, 2 Paige, 581, cited by appellants, it was held that insolvency of one of the parties was a sufficient ground for the court to exercise its equitable jurisdiction in allowing an equitable set-off. But the set-off claimed and allowed was in existence in favor of the claimant at the same time with the other debt when the action began. And this, we think, will be found to be the fact in all of the cases, where such set-off has been allowed, on the ground of insolvency by the chancery court as a matter of equity jurisdiction. We have found no case, nor have we been referred to any, where the defendant was allowed to interpose an insolvent

claim against his suing creditor, bought up after action brought, and sought to be interposed on the ground of the insolvency of his creditor. The nearest approach to such a case is the case of *Aldrich v. Campbell*, cited by appellant, and found in 4 Gray, 284, where a negotiable promissory note was purchased, without notice that an action had been commenced on a debt from the purchaser to the maker, and before the notice of insolvency; the note under these circumstances was set up.

How different the equity there from the case before us. Here the claim in question was bought, not only after action begun, but after answer put in and issue joined, and we must suppose, from the affidavit submitted on the motion to amend the answer, with full knowledge of the insolvency of the plaintiff. Mr. Waterman says: "A debt cannot be set off in equity any more than at law, unless it existed against the plaintiff in favor of the defendant at the time of the commencement of the action, and had then become due and payable": Waterman on Set-off, sec. 381. He says, further, that the defendant cannot set off a debt of an insolvent which he had purchased with knowledge of insolvency: Sec. 133. See, too, *Smith v. Hill*, 8 Gray, 572.

We have examined the numerous authorities referred to by appellants' counsel, but we have not found that they sustain the position that a claim like that interposed here by the defendants, and purchased by the defendants after action brought and answered, and with full knowledge of the insolvency relied on as a ground of equity, can be entertained either as a counterclaim at law or as an equitable set-off under the equitable jurisdiction of the old court of chancery, now merged in the court of common pleas. Hence we must sustain the circuit judge in his ruling upon this question, and without regard to the probable consequences suggested by him as to the homestead, etc., which are discussed in the argument of appellant, but which we do not consider as involved necessarily in the appeal.

It is the judgment of this court that the judgment of the circuit court be affirmed.

SET-OFF AND COUNTERCLAIM. — For a general discussion of what may and what may not be counterclaimed or set up as a set-off: Note to *Gregg v. James*, 12 Am. Dec. 152-157; note to *Woodruff v. Garner*, 89 Am. Dec. 482-489. An independent tort cannot be counterclaimed against another tort: *Keller v. Goodrich*, 117 Ind. 556; 10 Am. St. Rep. 88, and note 94. A set-off against a judgment is not of right, but of grace, and is only granted where a

special equity is shown to justify it: *Thropp v. Susquehanna etc. Ins. Co.*, 125 Pa. St. 427; 11 Am. St. Rep. 909. A counterclaim is a demand of something which of right belongs to defendant, in opposition to the right of the plaintiff: *Venable v. Dutch*, 37 Kan. 515; 1 Am. St. Rep. 260; compare *Andre v. Morrow*, 65 Miss. 315; 7 Am. St. Rep. 658; *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122; *Schweickhart v. Stuewe*, 71 Wis. 1; 5 Am. St. Rep. 190; *Abbott v. Foote*, 146 Mass. 333; 4 Am. St. Rep. 314; *Whitworth v. Thomas*, 83 Ala. 306; 3 Am. St. Rep. 725. An essential of a set-off is that the demand must be due the party in his own right, either as an original creditor or as an assignee: *Olmstead v. Scott*, 55 Conn. 125; and to set up a counterclaim, the answer of defendant must contain a plain and distinct statement of the facts which constitute the same: *Curtiss v. Livingston*, 36 Minn. 312. A judgment against an insolvent firm is a good equitable set-off to a debt due to one of the partners from the judgment creditor or his assignee: *Seligmann v. Heller*, 69 Wis. 410; and a defendant in an action upon a contract may counterclaim a cause of action in his own favor against plaintiff for a balance due on an open, mutual, and current account, notwithstanding the pendency of a prior action brought by the defendant against the plaintiff upon certain items of the same account: *Lindsey v. Stewart*, 72 Cal. 540. So in an action upon a contract for money expended by a tenant in repairing a hotel, the owner may set up by way of defense that the building was burned down in consequence of plaintiff's carelessness: *Zigler v. McClellan*, 15 Or. 499. A demand against a plaintiff's husband, who is not a party to the action, cannot be counterclaimed: *Parker v. Cochrane*, 11 Col. 363; *Sloteman v. Thomas etc. Mfg. Co.*, 69 Wis. 499; nor can a judgment against a husband and wife be set off against a judgment obtained by them, when they make a claim for legal exemptions: *Junker v. Huster*, 113 Ind. 524. And in an action merely to recover money, defendant cannot set off an equitable counterclaim involving a mortgage foreclosure, etc., where the district court has no jurisdiction to determine the matters alleged in the counterclaim by reason of the situation of the mortgaged premises in another county: *Lyman v. Stanton*, 40 Kan. 727. So a demurrer to a counterclaim was correctly sustained, where plaintiff sued on a due-bill and for money due for labor performed, and defendant admitted owing for the labor performed, but claimed that the due-bill was merely for money deposited by plaintiff with him, and for a counterclaim set up that plaintiff owed him for rent of a certain dwelling-house, not alleging his interest in such house, which entitled him to demand rent: *Stevens v. Andrews*, 10 Col. 402.

COUNTERCLAIM — PLEADING AND PRACTICE. — Although plaintiffs may submit to a nonsuit at any time prior to the verdict, this rule has an exception in cases where the defendant has acquired some right which he is entitled to have determined, such as rights arising out of counterclaims and set-offs: *Gatewood v. Leak*, 99 N. C. 363; *McNeill v. Lawton*, 97 Id. 16; *Bynum v. Powe*, 97 Id. 374.

STATE v. JACOB.

[30 SOUTH CAROLINA, 181.]

CRIMINAL LAW — RECEIVING STOLEN GOODS — EVIDENCE. — On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, evidence is competent tending to show defendant's possession of other goods alleged by the prosecutor to have been stolen from him, in order to show his guilty knowledge as to the goods laid in the indictment, although such knowledge as to the other goods is not shown.

JURY AND JURORS. — A juror, in weighing the credibility of testimony, has a right to take into consideration his own knowledge of the character of the witness delivering such testimony.

INSTRUCTIONS — CHARGE ON MATTER OF FACT. — To say to the jury about an unimpeached witness, "Now, do you believe the witness? It is not a question as to her veracity. I have heard no evidence against her veracity. But counsel argue that she was mistaken," — is not a charge in respect to matter of fact so as to constitute error.

INSTRUCTIONS — CHARGE ON MATTER OF FACT. — Where the court tells the jury that an unimpeached witness having testified to a material fact, it is not probable that he was mistaken, and that if defendant had willfully misstated that one fact, it could be safely concluded that she would make other false statements, this is a charge as to matter of fact, and erroneous.

PLEADING AND PRACTICE — NEW TRIAL. — Where the court erroneously rules as to the number of peremptory challenges to be allowed, and after this right has been partially exercised, the ruling is corrected, and the number of such challenges lessened, but the parties are still allowed the full number of challenges sanctioned by law, there is not such error as will be ground for a new trial.

Charles A. Douglass, for the appellants.

J. E. McDonald, contra.

McIVER, J. In this case the defendants were indicted for receiving stolen goods, exceeding the value of twenty dollars knowing them to have been stolen. When the case was called for trial the circuit judge directed that the defendants be arraigned, and announced that they were each entitled to twenty peremptory challenges. After each of the defendants had peremptorily challenged two of the jurors presented, the judge reconsidered his ruling, and held that the defendants were each entitled to only five peremptory challenges, to which ruling exception was duly taken by the counsel for defendants. After exhausting their remaining challenges of three each, under the final ruling of the circuit judge, the jury was organized and the trial proceeded.

"Upon the trial of the cause the presiding judge admitted as competent, against the exception of defendants' counsel, testimony going to show defendants' possession of goods alleged by

prosecutor to have been stolen from him, and to the identity of which he testified, said goods not having been alleged or described in the indictment." The charge to the jury appears to be set out in full in the case, and in it we find this language in reference to the testimony thus objected to: "I have said before during this trial that the testimony in regard to a quantity of these goods was introduced for the purpose of showing the guilty knowledge of the defendants, but for no other purpose was that necessary"; and the jury were explicitly instructed that they could not find the defendants guilty unless they believed that they had received some or all of the articles mentioned in the indictment, knowing them to have been stolen, even though they might come to the conclusion that some or all of the goods not mentioned in the indictment were so received by the defendants.

The jury having found the defendants guilty, they were each sentenced to pay a fine of \$150, and be imprisoned in the penitentiary at hard labor for four months. Defendants appeal, substantially, upon the following grounds: (The first ground, having been abandoned, need not be stated); the second and third grounds allege error in receiving testimony as to the possession by the defendants of stolen goods other than those laid in the indictment; the fourth ground complains of error on the part of the circuit judge in instructing the jury that they were presumed to know the character of the witnesses, and might take that into consideration in making up their verdict; the fifth and sixth grounds complain that the circuit judge invaded the province of the jury by charging on the facts, in the particulars which will hereinafter be specified; the seventh ground complains that defendants were misled by the change in the rulings of the circuit judge in regard to the number of challenges to which they were entitled, and that for this reason their motion for a new trial in the court below should have been granted.

It does not seem to us that there was any error in receiving the testimony which is made the basis of the second and third grounds of appeal. As appears from the extract made from the judge's charge above, this testimony was received solely as a circumstance tending to show guilty knowledge on the part of the defendants, and the jury were carefully instructed to consider it only in that light. As is said in 1 Greenleaf on Evidence, section 53, note b: "The general rule undoubtedly is, that a distinct crime, unconnected with that laid in

the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely that he would commit another. In all criminal cases, however, where the felonious intent or guilty knowledge is a material part of the crime, evidence is admissible of similar acts of the prisoner at different times, if such acts tend to prove the existence of such guilty knowledge or felonious intent." One of the illustrations there given is this very charge of receiving stolen goods, where the gist of the offense is the guilty knowledge of the party charged: See the cases there cited.

So in Roscoe on Criminal Evidence, at page 92, the author, in speaking of this subject, says: "There are three classes of offenses in which, from the nature of the offense itself, the necessity for this species of evidence is so frequently necessary that they will be considered separately. These are conspiracy, uttering forged instruments or counterfeit coin, and receiving stolen goods. In these the act itself, which is the subject of inquiry, is almost always of an equivocal kind, and from which *malus animus* cannot, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions." In *Rex v. Wylie*, 4 Bos. & P. 92, it was held that on the trial of an indictment for uttering a forged note, knowing it to have been forged, it was competent to show that the prisoner had previously passed other forged notes, not mentioned in the indictment, to other persons, for the purpose of proving the *scienter*, and the same doctrine has been held in this state in at least three cases: *State v. Petty*, 1 Harp. 59; *State v. Houston*, 1 Bail. 300; *State v. Williams*, 2 Rich. 418; 45 Am. Dec. 741.

Upon the same principle it seems to us clear that the same doctrine should be applied in the present case. The mere fact that a person has passed one forged note, or has received a single article of stolen goods, might furnish but slight evidence that, in the one case, he knew the note was forged, or in the other, he knew the article was stolen; but if it is shown that he has passed a number of forged notes, or has received a considerable number of stolen articles, this certainly tends to show a guilty knowledge, and if so, then it is competent, and it will be for the jury to consider its weight.

It is, however, ingeniously argued by the counsel for appel-

lants that testimony that the accused has received other articles of stolen property than those mentioned in the indictment, even for the purpose of showing the *scienter*, is not competent, unless it appears that the accused received such other articles, knowing them to be stolen; and it must be conceded that there are expressions in the cases cited by him which would seem to warrant such a limitation of the rule; but we know of no case in which it has been so decided. On the contrary, the case of *State v. Houston, supra*, negatives any such idea. For in that case it was held that on the trial of an indictment for uttering a forged note, knowing it to have been forged, it was competent, for the purpose of showing defendant's guilty knowledge, to show that another note uttered by him was forged, although he had previously been acquitted under an indictment for uttering the last-mentioned note, knowing it to have been forged.

Indeed, in none of the cases which we have been able to examine does it appear to have been regarded as necessary to show that the accused had uttered other notes than the one laid in the indictment, knowing them to have been forged; but the admissibility of such testimony seems to have been rested upon the ground that, while it is not at all improbable that a person might innocently pass a single forged note, it was not at all probable that he would pass a number, or even several, of such notes without knowing they were forgeries. So here, while the fact that one has received a single article of stolen goods would afford but slight, if any, evidence that he knew such article was stolen, yet if it is shown that he has received a number of articles of stolen property, especially where, as in this case, such articles were shown to have been stolen from the same person, and probably about the same time, this is a circumstance from which guilty knowledge may be inferred, though the weight to be attached to such circumstance is exclusively for the jury.

The fourth ground of appeal is based upon the following language in the judge's charge to the jury: "There is one thing outside the record that you are presumed to know, and that is, the character of the witnesses who have testified. You have been drawn from the vicinage for the reason that you are supposed to know the witnesses who testify." This, it is argued, was erroneous, because in violation of the rule that the jury must draw their conclusions from the testimony adduced in the case, and not from facts known to them, or any

one or more of them. While it is undoubtedly true that a jury is not at liberty to consider any fact pertinent to the issue which they are called upon to try unless it is found in the testimony adduced, even though such fact may be known to some one, or all, of the jury, yet this rule does not, and cannot, from the very nature of things, forbid a juror, in weighing the credibility of the testimony, from taking into consideration his own knowledge of the character of the witness delivering such testimony. The credibility of testimony is a question exclusively for the jury, and we do not see how it is possible for a juror in considering that question to exclude from his mind his own knowledge of the character of the witnesses. The question is, What impression does the testimony make upon the minds of the jurors? and that impression must necessarily be affected by their own knowledge of the character of the witnesses from whom such testimony proceeds. We suppose that it rarely, if ever, happens that the character of at least some of the witnesses is not known to some or all of the jurors, and we do not see how any rule of law can prevent such knowledge from having its weight. If a fact is testified to by a witness whom the jurors know to be of such an infamous character as to render him totally unworthy of belief, it is difficult to understand how any rule of law can compel a jury to believe that which they cannot believe. The constitution of the human mind renders such a rule as that contended for utterly impracticable.

But we are not without authority in our own state for the view which we have taken, as may be seen by reference to the case of *McKain v. Love*, 2 Hill (S. C.), 506, 27 Am. Dec. 401, where it was expressly held that a jury must in some degree act upon their own knowledge of the character of the witnesses, Johnson, J., in delivering the opinion of the court, saying: "To exclude matter of this sort would be to strip the trial by jury of one of its most valuable appendages,—the right of weighing the credibility of witnesses." The same doctrine was plainly implied, though the point was not raised, by what was said in the recent case of *State v. Jones*, 29 S. C. 233; and we are not aware that it has ever before been questioned in this state.

The fifth and sixth grounds of appeal complain that the circuit judge invaded the province of the jury by charging them with respect to matters of fact, in violation of section 26, article 4, of the constitution. The specification relied upon in the fifth ground is, that the judge used the following language

in his charge to the jury: "Now, do you believe Mrs. Boag? It is not a question as to Mrs. Boag's veracity. I have heard no evidence against her veracity. But counsel argue that Mrs. Boag was mistaken," etc. It seems that Mrs. Boag, the wife of the prosecutor, who had, principally, charge of the dry-goods department of her husband's store, from which the goods in question were alleged to have been stolen, was introduced as a witness to identify the articles found in the house of the defendants, and that she relied, somewhat at least, upon her husband's private mark on the goods, as a means of identifying them. It also appeared that there was a direct conflict between her and the defendant Patsy, who was examined as a witness for the defense, especially in regard to the marks on an infant's sack, one of the articles found in the house. The argument, as we understand it, is, that by using the language above quoted the judge expressed or indicated to the jury his opinion as to the veracity of Mrs. Boag. We do not so construe that language. It does not appear that the veracity of Mrs. Boag was impeached, either by evidence or in argument, and the judge, in using the language objected to, was simply narrating facts which had transpired in the presence of the jury, and cannot be regarded as expressing, or even indicating, his own opinion as to any fact which the jury was called upon to consider.

The particular language relied upon as the basis of the sixth ground of appeal is, as there quoted, though there is a slight verbal inaccuracy, which, however, does not affect the sense, as follows: "Patsy says that the little sack, when taken from her possession, had no mark upon it, while Mrs. Boag testifies that it has her private mark on it, and that that mark was not put on it since taken from Patsy's possession. If Mrs. Boag made that mistake, might that private mark have been put there without her knowledge? This is improbable. But if you come to the conclusion that the witness has willfully misstated a fact, then you may safely conclude that she would misstate facts which would be to her advantage if the testimony came out uncorroborated,—that is, if you come to the conclusion that she has willfully misstated a fact."

This matter of charging upon the facts has been so often before this court that it is unnecessary to cite authorities to show that the rule is well settled that the circuit judge should carefully avoid expressing, or even indicating, his own opinion as to any of the facts of the case, leaving it for the jury,

unbiased by any impressions which the testimony may have made on the mind of the judge, to determine what facts have been established. So that our inquiry here is, whether this rule has been violated in the present case. We are constrained to say that we think it has; and for this reason there must be a new trial. It will be observed that one of the material questions in the case was, whether the goods were identified, and as the private mark of the prosecutor was relied upon as a means of identification, it of course became a very important inquiry whether that little sack, which seems to have been more specifically mentioned than any of the other articles, had such private mark upon it at the time it was taken from defendant's possession, and as to this there was a direct conflict between the testimony of Mrs. Boag and the defendant Patsy; and as the veracity of Mrs. Boag had not been impeached in any way, the real inquiry was, whether Mrs. Boag might not have been mistaken in saying that the private mark was not put on the sack after it was taken from Patsy's possession.

Upon this point, it seems to us that the judge pretty clearly indicated to the jury his own opinion, that Mrs. Boag was not mistaken, when he told the jury that it was not probable that the mark was put on the sack after it left Patsy's possession without the knowledge of Mrs. Boag. This was a matter exclusively for the jury to determine, unbiased by any impression made upon the mind of the judge. If the mark was on the sack when it left Patsy's possession, the natural conclusion would be that she had testified falsely in denying that fact; and when the jury were told that an unimpeached witness had testified that it was on the sack at the time, and that it was not probable that such witness was mistaken in making that statement, the jury would very naturally conclude that the impression made upon the mind of the judge was that Patsy had testified falsely, especially when it was immediately followed by the statement that if the witness had willfully misstated one fact, the jury might safely conclude that she would make other false statements.

The only remaining inquiry is that presented by so much of the seventh ground of appeal as complains that the circuit judge should have granted defendant's motion for a new trial, because they were misled by the first ruling in reference to the arraignment and the number of challenges to be allowed, the motion in arrest of judgment having been abandoned.

Inasmuch as it is conceded, and properly conceded, that there was no error of law in the final ruling as to this matter, we do not see that the defendants have any legal ground upon which to rest their complaint; and if their motion for a new trial rested upon any other ground, then it was a matter solely for the discretion of the court below, with which we cannot interfere. The defendants were not denied any right which they were entitled to by law. They were allowed the full number of challenges provided for by law, and the fact that they had each exercised the right of challenging two jurors, while they were led to suppose, from the first ruling of the circuit judge, that they were entitled each to twenty, instead of five, challenges, cannot affect the question. No juror whom they had a right to challenge peremptorily was allowed to sit, and we do not see that this ground presents any error of law which we have a right to consider. It may be that if defendants had known at the outset that they would be limited to five challenges they would not have challenged the two who were challenged, when they supposed they would be entitled to twenty challenges, but would have preferred to have exercised that right towards others supposed to be more objectionable than those who were actually challenged; but it is well settled that the right of challenge is a right to reject, and not a right to select, jurors: *State v. Wise*, 7 Rich. 412, and authorities there cited. Hence, where there is no denial of the right to reject the number of jurors to which the party is entitled, it cannot be said that there is any error of law in organizing the jury.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

RECEIVING STOLEN GOODS, knowing them to be stolen, is a crime altogether distinct from the crime of larceny of such goods: *Allison v. Commonwealth*, 83 Ky. 254; and on a trial for the crime of receiving goods, knowing them to have been stolen, the jury must find in their verdict of conviction the value of the stolen property: *Thompson v. People*, 125 Ill. 256; compare *Wright v. State*, 5 Yerg. 154; 26 Am. Dec. 258, and note 261; *State v. Rushing*, 69 N. C. 29; 12 Am. Rep. 641.

JURY AND JURORS. — As to the application of the personal knowledge of a juror in forming a verdict, see *Ottawa Gas etc. Co. v. Graham*, 28 Ill. 73; 81 Am. Dec. 263, and particularly note 267, 268.

STRAIN v. BABB.

[80 SOUTH CAROLINA, 242.]

STATUTE OF LIMITATIONS. — Section 123, Code of South Carolina, providing that action may be brought on a claim against a deceased person within one year after administration is granted, applies only to those cases where no administration is taken out until after the expiration of the statutory period, the statute having commenced to run in the lifetime of the decedent.

OFFICIAL BONDS — LIABILITY OF SURETIES. — An action against a court clerk and his sureties for his failure to properly enter a judgment is an action on his official bond, and as such bond is not for the payment of money only, within the meaning of the statute, the right of action against the principal and sureties is not barred until the expiration of twenty years, under section 111, Code of South Carolina.

MEASURE OF DAMAGES IN ACTION ON OFFICIAL BOND. — Where a judgment lien loses its rank through the neglect of a court clerk to enroll it, the measure of damages in an action on his official bond is the amount lost through such neglect, depending upon the amount of such lien, of junior liens, and of the value of the judgment debtor's property.

PLEADING AND PRACTICE. — THE DEMAND IN THE COMPLAINT IS NO PART of the action, and does not give it character. The facts alleged do this, and plaintiff is entitled to such relief as they warrant.

JUDGMENT, IN ACTIONS ON OFFICIAL BONDS, should go for the penalty, and stands for the benefit of all injured parties, who, by proper proceeding, may have their damages assessed, with leave to issue execution.

F. P. McGowan and W. H. Martin, for the appellant.

N. B. Dial, Ferguson and Featherstone, and Ball and Watts, for the respondent.

SIMPSON, C. J. The plaintiff, appellant, Elizabeth Strain, some time previous to November, 1880, obtained a decree against John T. McGowan for one thousand dollars, which, on November 5, 1880, was handed to M. E. Babb, the then clerk of the court of common pleas for Laurens County, to be by him disposed of according to law. This decree seems to have been marked "filed" by the said Babb, but nothing more was done. It was not enrolled nor entered in the book of abstract of judgments, nor indexed, and it was found by the successor of Babb, in 1885, in an old desk in the office, who then enrolled it, etc. In the mean time Babb died, and the defendant, Martha M. Babb, his widow, administered upon his estate. In the mean time, also, several judgments were obtained against McGowan, and one or two mortgages were executed by him, covering his real estate, which mortgages and judgments, it is alleged, swept away his property with prior liens to Mrs.

Strain's decree, because of the fact that her decree had not been entered, as above mentioned.

The action below was brought against Mrs. Babb as administratrix, and the surviving sureties on the official bond of M. E. Babb, claiming to hold them responsible for the alleged neglect of duty of the said M. E. Babb, as clerk, in not properly entering, etc., the decree aforesaid, the plaintiffs demanding in their complaint judgment for the breach of the bond and for the sum of one thousand dollars, with interest thereon from November 5, 1880, and interest at seven per cent, and costs. The defendants interposed and relied mainly upon the statute of limitations, alleging in their answers that more than six years had elapsed since the cause of action accrued, to wit, since November 5, 1880, the day that the decree was delivered to Babb, the clerk, and marked by him "filed." His honor the circuit judge charged the jury as to the neglect of duty on the part of the clerk, and also as to the damages incurred. And he ruled, as matter of law, that the cause of action was not the official bond of the clerk, but it was the neglect of duty on his part, and therefore that the limitation within which such an action should be brought was six years, instead of that applicable to certain bonds to be mentioned hereafter. The cause of action accrued on November 5, 1880, and the action was brought in July, 1887,—six years and some eight months after the accrual of the right. Such being the admitted facts as to these dates, his honor ruled that the action was completely barred as to the defendant's sureties on the official bond; but as to the administratrix, Babb having died, this event suspended the statute for nine months, and consequently it did not protect her as the administratrix.

The jury found for the plaintiffs \$1,549, the amount of the decree with interest from November 5, 1880, against the defendant, Mrs. Babb, administratrix. The brief does not state whether the verdict mentioned the sureties or not. The notice of appeal, however, of plaintiffs' attorneys refers to the judgment entered up in favor of the sureties, and we suppose, therefore, the jury found for these defendants.

After the finding of the jury, upon a motion being made for a new trial by attorneys of Mrs. Babb, administratrix, his honor set aside the verdict and granted the motion for a new trial on account of misdirection in his charge, as he conceived, to wit, that nine months should be added to the six years on account of the death of Babb, his honor holding that section

123 of the code had repealed this provision in so far as the case before the court was concerned, which section he had overlooked in his charge.

From this order, and from the judgment entered in favor of the sureties, the plaintiffs have appealed, on the ground of error alleged in granting the new trial for the reason stated, and in holding that the cause of action was the neglect of duty, and not the breach of the official bond, and therefore the action was barred both against the sureties and the administratrix, — six years having clearly elapsed since November 5, 1880, the day on which the neglect of duty occurred. The defendant administratrix gave notice that if the order of new trial could not be sustained on the ground upon which it was granted by the judge, she would seek to sustain it on other grounds, to be noticed hereafter if necessary.

Now, we think the fundamental error in the case was the ruling of his honor that the official bond of the clerk was not the cause of the action, but that the neglect of duty, independent of the breach of the bond, was the cause. If his honor had been correct in this ruling, then his subsequent holding as to the statute, we think, would have been correct as to the sureties, and also his ruling in the first instance as to the suspension of the statute for nine months after administration granted, on account of the death of the clerk. We do not think, however, that section 123 of the Code has any application to the facts of this case. That section, in our opinion, applies only to those cases where no administration is taken out until after the expiration of the statutory period, the statute having commenced in the lifetime of the decedent. But if his honor was in error in holding that the breach of the bond was not the cause of action, and that the neglect of duty was alone the cause, then the question would be as to the character of the bond and the limitation prescribed by the statute as to such bonds.

If the action was brought simply for the neglect of duty on the part of the clerk, the defendant's sureties need not, and could not legally, have been made parties. They were guilty of no neglect of duty in failing to have the decree of the plaintiffs properly entered in the abstract of judgments. They did not hold the office of clerk, nor was it in any sense their duty to see to the enrollment of decrees and judgments, or otherwise attending to the duties belonging to said office. They were responsible only on their contract or bond given as a guaranty

that the clerk would properly discharge his duty. Our understanding of the law in such cases is this: The law imposes certain duties upon the officer, for the failure to perform which he may or may not be liable alone in a separate action against him; but in addition he is required to give bond to the state with sufficient sureties, in which all parties thereto bind themselves that he will discharge said duties, and this bond is breached by a failure thus to discharge, and this breach becomes a cause of action against all of the obligors. It was for the alleged breach of the bond here that the action below was brought. The complaint in the demand for judgment, after stating the facts of Babb being clerk and having given bond, and alleging a breach, etc., prayed judgment for said breach. True, the demand was not for the penalty, as it should have been, but was for a specific amount, to wit, the amount of plaintiff's decree and interest. But a demand is no part of the action, or rather, it does not give character to the action. The facts alleged do this, and the plaintiff is entitled to such relief as these facts will warrant.

Having reached the conclusion that the action below was upon the official bond of the clerk, the next question is, What is the statutory limitation in such case? The code answers. Section 111 provides that actions upon bonds other than for the payment of money may be brought within twenty years, or else they are barred, and this applies to all of the obligors, principal as well as sureties. Was the bond below a bond other than for the payment of money? True, it was a bond the breach of which sounded in money,—damages,—and the penalty was for a specific amount, but yet it was not for the payment of money in the sense of the statute. It was in the nature of a covenant,—a contract under seal, by which the obligors thereto bound themselves under the specified penalty to answer for the neglect of duty, if any, on the part of the clerk, to the extent of such injury as any party might sustain by such neglect, not to exceed the penalty. It was a bond other than for the payment of money, in the sense of the statute. Why the general assembly made this distinction between bonds, we cannot conceive, but *ita lex scripta est*. And we have no alternative but to enforce it in proper cases.

In the case of *State v. Lake*, 30 S. C. 43, the bond sued on was executed before the present statute of limitations, and when bonds of this kind were held to be covenants, and subject to limitations applicable to covenants. Hence this court

held that the action there was barred both as to principal and sureties, the statutory period having expired before action brought. Here, however, the bond was given after the statute was enacted, fixing the period at twenty years as to bonds other than for the payment of money. Hence that period must be applied.

We think it was error for his honor to charge the jury that if junior judgments and liens swept away all of the property of McGowan, that in such case the plaintiff was entitled to a verdict for the full amount of her claim and interest. This was error, because it closed the door to any inquiry on the part of the jury as to the amount and value of the property of McGowan thus swept away; *non constat* but that McGowan's property might have been wholly insufficient to pay the full amount of plaintiff's decree, if it had not been swept away by said junior liens.

We will remark here, though this question has not been raised in the case, that the proper practice in cases like this is for judgment to go for the penalty, which stands for the benefit of all injured parties, who, by proper proceeding, may have their damages assessed, with leave to issue execution: *State v. Moses*, 18 S. C. 367.

The result of our conclusion is, that there should be a new trial out and out, under the principles herein announced above, with leave on the part of the defendants to have the question of damages reopened and reconsidered. And to this end, it is the judgment of this court that the order granting a new trial by the circuit court be affirmed, and that the judgment in favor of the sureties be reversed.

ACTIONS ON OFFICIAL BONDS — LIABILITY UPON. — Every public officer whose duties are not judicial in their nature is liable in damages to an individual who suffers special injury from the negligent performance or non-performance of such officer's duties: *Robinson v. Chamberlain*, 34 N. Y. 389; 90 Am. Dec. 713; *Nowell v. Wright*, 3 Allen, 166; 80 Am. Dec. 62; *Eslava v. Jones*, 83 Ala. 139; 3 Am. St. Rep. 699, and note 702.

OFFICIAL BONDS. — The sureties of a circuit clerk are liable to the county for injury resulting from the issuance of false and fraudulent witness certificates: *Lewis v. State*, 65 Miss. 468; compare *Whyte v. Mills*, 64 Id. 158.

LIMITATIONS — OFFICIAL BONDS. — The rule laid down in the principal case did not apply prior to the adoption of the present South Carolina code. At that time a recovery could be had upon an official bond of a circuit clerk upon showing breaches of its covenants only when such breaches occurred within six years: *State v. Lake*, 30 S. C. 43.

UTSEY v. HIOTT.

[30 SOUTH CAROLINA, 302.]

CONSTITUTIONAL LAW — SPECIAL STATUTES. — While the legislature may pass laws which affect only certain localities and classes, still it cannot make an exemption from the operation of a general stock law in a particular locality, and then go further, and make an exception of certain individuals of a particular class within that exemption, simply on the ground that they had "conformed" to such general law, especially when the special and the general law are so essentially connected that the former cannot take effect separately. Such a law is unconstitutional and void.

W. B. Gruber, for the appellant.

W. Perry Murphy and A. S. Farrow, for the respondent.

McGOWAN, J. From the agreed case it appears that both the plaintiff (respondent) and the defendant (appellant) reside within the territorial limits exempted from the operations of the general stock law by act of 1887, "to exempt certain portions of Colleton County from the operation of chapter 27, title 10, General Statutes, in relation to the general stock law": 19 Stats. 1002; that in April, 1888, one of the defendant's cattle wandered upon the cultivated lands of the plaintiff, and was seized by him while so trespassing, under the provisions of the general stock law, and claim was made for seizure and damages. Thereupon the defendant went before a trial justice and gave bond for the expenses of seizure and damage, should any be awarded, and retook his property. Suit was thereupon instituted by the plaintiff to recover the expenses of seizure and damages under the general stock law. One of the counts in the complaint also alleged three dollars damage at common law, and prayed judgment thereon.

It appeared that the plaintiff cultivated his crops without inclosure. During the summer months his cattle were placed in charge of persons residing in other neighborhoods within the territorial limits exempt by act of 1887. While in charge of these persons, who were paid for their trouble, the cattle roamed at large, and were sometimes impounded by persons upon whose lands they trespassed, and the plaintiff paid the costs and damages. In the fall, plaintiff took his cattle home and allowed them to graze in his fields. Later, when the crops of the neighborhood were harvested, the cattle were permitted to roam at large. One or two persons residing in the neighborhood objected to this, and impounded plaintiff's cattle,

and he paid the costs and damages. Nearly all his neighbors allowed their stock to pasture at large during the winter months. The practice of the plaintiff here described embraced that period of time intervening between the general stock law (1882) and the act of 1887.

Under these circumstances the trial justice gave judgment in favor of the defendant, and dismissed the complaint, upon the ground that the plaintiff, not having "conformed to the general stock law," could not claim the benefit of the proviso to the exempting act (1887), which declares that "those owning real estate in Colleton County who have conformed to the general stock law shall not in any way be affected by the operations of the act." Appeal was taken to the court of common pleas, and Judge Pressley, holding that the practice of the plaintiff as to the management of his cattle was "a substantial conformity to the general stock law, reversed the judgment of the trial justice, and gave the plaintiff judgment for three dollars and costs. He also held that the act of 1887, "to exempt certain portions of Colleton County from the general stock law" (19 Stats. 1002), operates "unequally upon the persons within its territorial limits and the same business, and is therefore unconstitutional and void."

From this order and judgment the defendant appeals to this court upon the following exceptions: "1. For that his honor erred in holding that the respondent (plaintiff) had proved a conformance to the general stock law. 2. For that his honor erred in holding that the act of 1887 (to exempt certain portions of Colleton County from the operation of the general stock law) was in violation of article 1, section 12, of the constitution of South Carolina, and therefore unconstitutional and void. 3. For that his honor erred in refusing to hold that if the proviso of said act of 1887 was unconstitutional, that the proviso alone was unconstitutional, and the body of the act valid."

The law commonly known as the general stock law, in order to secure parties in cultivating their crops without fences, makes it unlawful for the owners to allow cattle to roam at large. The plaintiff lives in a part of Colleton County which has been exempted by act of the legislature from the operations of the stock law, and yet the seizure of the defendant's cattle and his action for the expenses of seizure and damages are founded on the provisions of the general stock law. At first view this would seem inconsistent, but it arises in this

way: upon the passage of the general stock law (1882), which prohibited cattle from roaming at large, it seems that some persons in Colleton County conformed to it by removing their fences and inclosing their cattle, while others did not do so. Afterwards (1887) the legislature passed a law exempting a certain portion of Colleton County from the operation of the stock law; and in order to protect those within that territory who had "conformed" to the general law of 1882, a proviso was inserted in the exempting act, as follows: "Provided, those owning real estate in Colleton County who have conformed to the general stock law shall not in any way be affected by this act"; that is to say, the stock law was not repealed, but still left in force, as to such persons.

The plaintiff rested his case in the first instance on this proviso, claiming that he was one of those within the exempted territory who had "conformed" to the stock law, and therefore was entitled to all the rights and benefits conferred by that law. It was, however, insisted on the other side that, as matter of fact, he was not one of those who had "conformed"; but if he was, the proviso itself was and is unconstitutional and void, as being repugnant to section 12, article 1, of our constitution, which declares that "no person . . . shall be subjected in law to any other restraint or disqualification, in regard to any personal rights, than such as are laid upon others under like circumstances," and is also in conflict with the fourteenth amendment of the constitution of the United States, which, among other things, declares that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws." To this it was replied that if the proviso is void, that must necessarily affect and avoid the whole exempting act, leaving the parties simply under the provisions of the general stock law.

Is the exempting act (1887) unconstitutional, either in whole or in part? We assume that the local character of the act does not make it necessarily unconstitutional. While there may be some just objections to local laws in general, it is well established that "the authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or a single class of its citizens only. The circumstances of a particular locality, or the prevailing sentiment in that section of the state, may require or make acceptable different police regulations from

those demanded in another. The legislature may therefore prescribe different laws of police in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. . . . If the laws be otherwise unobjectionable, all that can be required in those cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." And, as Mr. Justice McIver said in the case of *State v. Berlin*, 21 S. C. 296, 58 Am. Rep. 677, "the whole matter is well summed up in a note on the same page of Cooley on Constitutional Limitations (390), in the following words: 'To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state; all that is required is, that it shall apply equally to all persons within the territorial limits described in the act': See *State v. Hayne*, 4 S. C. 410; *State v. Columbia*, 6 Id. 1; *Kaminitsky v. Northeastern R. R. Co.*, 25 Id. 58.

The legislature, then, having the right to pass laws which affect only certain localities and classes, the question arises here whether it was within its constitutional power not only to make an exemption from the operation of the general stock law in a particular locality, rather vaguely defined, in part at least, by an "imaginary line," but to go further, and make an exception of certain individuals within that exception, simply on the ground that they had "conformed" to a previous general law upon the subject. So far as appears in the case, all the persons living within the exempted territory belonged to the class of farmers cultivating the soil and raising stock as a business, and in their calling were in no way limited to any particular mode of conducting their operations, except that they should not violate the law. Some, however, did not conform to the law, and that course put their farms into condition, in same respects, different from that of those who did "conform" to it, and they removed their fences. Did such difference in the condition of the farms in the exempted territory divide the owners into two classes so separate and distinct as to authorize the legislature to make rules and regulations as to one class entirely different from those applicable to the other? We cannot think so.

All the persons interested were not only living in the exempted territory, but were distinctively farmers, the difference in the condition of their respective farms, claimed to exist, being only that produced by the conduct of those who did not "conform" to the law, and which, we cannot think, was sufficient to place them in such distinct "classes" as to justify class legislation in favor either of those who "conformed" or of those who did not conform to the general stock law. As we understand it, previous conduct does not authorize partiality in the law. An act excepting from its operation all good men would surely be in conflict with the absolute equality required by the constitution. "A statute would not be constitutional which . . . should select particular individuals from a class or locality, and subject to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Every one has a right to demand that he be governed by general rules; and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor; for the favorite at court, and the countryman at plow. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments": Cooley on Constitutional Limitations, 483, 484, and notes. The line seems to be drawn at "classes," and some of the cases (Missouri), with the force of anithesis, put it thus: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."

Now, simply as an illustration, we suppose that there is no doubt that the first proviso of the act under consideration (1887) would fall under this prohibition as to persons "of a class"; for it expressly and in terms excepts from the exemption enacted the lands of certain persons by name, viz., James L. Gantt, the estate of W. M. Brailsford, and Theodore D. Jervy; and we think the same principle must apply to the second proviso, which excepts those owning real estate in Colleton County "who have conformed to the general stock law." We entirely understand and appreciate the object which was in

contemplation when the legislature inserted the proviso in question. The intention manifestly was, while making the exemption, to protect those within the exempted territory who, as law-abiding citizens, had "conformed" to the general law upon the subject. But without regard to the laudable purpose, we do not think that the legislature could except from the exemption certain farmers while declining to exempt others living in the same territory. According to our view, the proviso makes a distinction between citizens who were all farmers, living in the same territory and under like circumstances, which is in conflict with the fundamental law, and we are therefore constrained to hold that it is unconstitutional and void.

But we think that, as a necessary consequence, makes the whole act of 1887 void. It is true that a part of an act may be declared unconstitutional, and the other portions remain unaffected, but that must always depend upon the nature of the connection between the bad part and the other parts of the act. "When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. . . . And if they are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently,—then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them. . . . It has accordingly been held that where a statute annexed to the city of Racine certain lands, but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city, the latter provision being held unconstitutional, it was also held that the whole statute must fall, inasmuch as such provision was clearly intended as a compensation for the annexation: Cooley on Constitutional Limitations, 215–217, and notes.

In this case, the two sections of the act are upon the same subject, and essentially connected. Indeed, the proviso was only made necessary by the exempting provision. The legis-

lature evidently intended that the act should take effect as a whole, and we are not authorized to presume that they would have passed the one without the other, — the exemption without the exception. We think it would defeat the intention of the law-makers to erase the proviso, and leave the exempting clause within the particular territory, without exception or qualification. It is not the proviso alone that is objectionable, for, in itself, it is but the reaffirmation of the stock law as to certain persons; but the difficulty springs from its connection with the exempting clause. It is the two together which makes the inequality under the law.

Besides, the inequality is intensified here because of the peculiar character of the stock law, which confers rights and imposes obligations so reciprocal in their nature that the benefits supposed to be afforded by it cannot be enjoyed or practically enforced unless its operations are made general in the same community. One man may nominally have the right to cultivate his crop without fences, but assuredly that right would be worse than useless to him unless his neighbors were required to keep their stock from trespassing. This seems to be one of those cases where there cannot be a perfect individual right, but in order to be beneficial it must be general. The circuit judge well expressed it when he said that, "Under such circumstances, I cannot perceive that the act can possibly be made to operate equally on persons in the same business within the exempt territory. It is worse than shadow without substance. The supposed exemption to persons within the territory along the boundary lines actually doubles their burdens. The effect is to compel them to pay the penalty, if their stock shall wander across the boundary line, and also to fence their cultivated fields as a protection against stock within the exempt territory, but further inward from said boundary. And this same result follows all over the exempt territory, wherever there be any one who, under said proviso, has the benefit of the general stock law," etc.

With a strong consciousness of the fallibility of human judgment, we hesitate to declare an act of the legislature — a co-ordinate defendant of the government — unconstitutional and void, and never do so, except in the conscientious discharge of what is deemed to be official duty. The view we have taken of the case renders it unnecessary to consider the other questions raised. The act of 1887 being unconstitutional,

the parties stand upon their rights under the general stock law of 1882.

The judgment of this court is that the judgment of the circuit court be affirmed.

CONSTITUTIONAL LAW—LOCAL AND PRIVATE LAWS. — As to what are and the effect of such laws, see *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893, and extended note 903, 904.

SPECIAL ACTS, POWER OF LEGISLATURE TO PASS: *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; *Ex parte Lichtenstein*, 67 Cal. 359; 56 Am. Rep. 713.

ANDERSON v. PILGRAM.

[30 SOUTH CAROLINA, 409.]

MORTGAGEE. — A MORTGAGEE WHILE PROSECUTING AN ACTION on the equity side of the court for foreclosure of his mortgage, in which he asks that execution may be awarded him for any balance left unpaid by the proceeds of the sale of the mortgaged premises, cannot at the same time maintain an action on the law side of the court on his note or bond.

MORTGAGEE. — WHERE SEVERAL NOTES, MATURING AT DIFFERENT TIMES, are secured by one mortgage, and an action to foreclose it is commenced, and based on one of the notes then overdue, the mortgagee may maintain an action at law on another of the notes when it matures, and while the foreclosure suit is still pending.

Bomar and Simpson, and Thomson, Nicholls, and Moore, for the appellant.

Carlisle and Hydrick, for the respondent.

McIVER, J. — This was an action on a note dated September 9, 1885, whereby defendant promised to pay to the plaintiffs, on November 1, 1887, two hundred dollars, with interest from date until paid, at the rate of ten per cent per annum; and the action was commenced on January 12, 1888. The only defense set up was, that, at and before the commencement of this action, another action was pending for the same cause between the same parties. To support this defense, a record of another action, commenced February 3, 1887, and still pending, was introduced, wherein the present plaintiffs were plaintiffs, and the present defendant, together with one J. D. Epps, to whom the mortgaged property had been conveyed by the defendant herein, were defendants.

The complaint in that action alleged, — 1. That on September 9, 1885, the defendant made and delivered to the plaintiffs six promissory notes, bearing that date, for amounts as fol-

lows: \$350, \$200, \$200, \$250, \$200, and \$200, and set out a copy of the note first to be paid, to wit, the note for \$350; 2. That on the same day the defendant, to secure the payment of the said notes, executed a mortgage on certain real estate described; 3. That on January 18, 1886, the mortgage was duly recorded; 4. That the said note, of which a copy is above set forth, "is due and payable, and no part thereof has been paid"; 5. "That the condition of said notes and mortgage has been broken, and there is due and remaining unpaid on said notes and mortgage the sum of \$350, with interest," etc.

It was admitted that the condition of the mortgage is that if the defendant "should pay the said debt according to the terms of the said notes, the conveyance should be null," etc., and that the prayer was "for the foreclosure of the mortgage, equity of redemption to be barred, the premises ordered to be sold, the proceeds to be applied to the payment of said debt, and execution awarded for the balance against S. M. Pilgram, and for other and further relief." It was also admitted that the note now sued on is one of the notes mentioned in the complaint for foreclosure, and that at the time the action for foreclosure was commenced the note for \$350 was the only one of the six which had then become payable.

The circuit judge instructed the jury that even if the note now sued on was included in the action for foreclosure, the plea of pendency of another action between the same parties for the same cause would not avail the defendant, because, under the authorities cited, a creditor who holds several notes secured by the same mortgage may sue at law on the notes, or any one of them, and at the same time prosecute his action in equity for a foreclosure of the mortgage; that he may resort to both remedies at the same time, though he will be entitled to only one satisfaction. He also, on request, instructed the jury that, under his construction of the record of the action for foreclosure, the note now sued on was not included in that action, as it only embraced the note for \$350, set out in the complaint, and did not include any of the other notes.

Under these instructions, the jury having rendered a verdict in favor of the plaintiffs, and judgment having been entered thereon, the defendant appeals upon the several grounds set out in the record, which substantially raise but two questions, to wit: 1. Whether a creditor, holding a note or bond, secured by a mortgage, may, while prosecuting an action on the equity side of the court for foreclosure of his mortgage, in which he

asks that execution may be awarded him for any balance left unpaid by the proceeds of the sale of the mortgaged premises, at the same time maintain an action on the law side of the court on such note or bond; 2. If not, whether the note sued on in this case was included in the action for foreclosure.

The circuit judge says, in discussing the first question, that his own impressions of the law had been otherwise, but the authorities cited required him to charge as he did. We think his honor was misled by these authorities, and that his first impressions were correct. The authorities relied on are 2 Jones on Mortgages, sec. 1215, and the case of *Burnell v. Martin*, Doug. 401, decided by Lord Mansfield. But owing to the radical change in the nature of a mortgage effected by our act of 1791, we do not think these authorities are applicable. We can very well understand that where a mortgage is regarded as a conveyance, and not as mere security for a debt, there is no objection to allowing a mortgagee to proceed at the same time to foreclose his mortgage, and bring an action at law to recover judgment on the debt. For there the action for foreclosure would not afford a complete remedy, as it did not contemplate a judgment for any balance left unpaid by the mortgaged property. There the mortgagee held the legal title to the mortgaged premises subject to the mortgagor's equity to redeem, and the object of the action to foreclose was simply to cut off, bar, such equity, and not to recover the amount of the debt.

Here, however, there is, properly speaking, no such thing as a strict foreclosure; for the legal title remains in the mortgagor, and not a mere equity to redeem. Hence the remedy of the mortgagee here is not to foreclose or bar an equity which does not exist, but to enforce the payment of his debt by a sale of the property pledged as security therefor. The phrases "foreclosure of a mortgage" and "equity of redemption" were imported here from England along with the body of the common law, and are yet in constant use; but it must always be remembered, in order to avoid being misled, that they have acquired a totally different meaning here from that which they bore in England. A mortgagor at common law having parted with the legal title by the mortgage could only regain it by paying the mortgage debt and demanding a reconveyance from the mortgagee. This was a mere equity, called the equity of redemption, and the real object and effect of judgment of foreclosure was simply to cut off this equity and confirm the

legal title in the mortgagee free from such equity. Here, however, the remedy of the mortgagee is by an action for the sale of the mortgaged premises and an application of the proceeds of such sale to the mortgage debt, and although usually called an action to foreclose, it is totally different in its character and results from a strict foreclosure.

This being the nature of the mortgagee's remedy, to enforce which it was necessary to ascertain judicially the amount of the mortgage debt, the practice gradually, and very naturally, sprang up, allowing the mortgagee in such an action to obtain not only an order for the sale of the mortgaged premises, and an application of the proceeds to his debt, but also a judgment, enforceable by execution for any balance which might remain unpaid by the proceeds of the sale. This practice, though for some years after the passage of the act of 1791 not recognized or acted upon, as it would seem from what is said by Wardlaw, Ch., in *Wightman v. Gray*, 10 Rich. Eq. 532, has now become well settled, and very generally, if not universally, acted upon, in this state at least.

This being the case, we see no reason why the mortgagee should be permitted to harass his debtor by two suits at the same time, both tending to the same result. The doctrine laid down by the authorities relied on by circuit judge, as well as those cited by the counsel for plaintiffs in the argument here, can only be sustained where the action to foreclose a mortgage is regarded in a different light from what it is here. The reason given by Kent, Ch., in *Jones v. Conde*, 6 Johns. Ch. 77, why a mortgagee is allowed to sue at law on the bond, and at the same time prosecute his action for foreclosure in the court of equity, is, that one is a proceeding *in rem* and the other *in personam*; and the same learned chancellor, in *Dunkley v. Van Buren*, 3 Johns. Ch. 330, refused to allow a judgment for the deficiency in an action to foreclose a mortgage, upon the ground that "such a suit is not intended to act *in personam*," but that the mortgagee in such an action "is confined in his remedy to the pledge." But in this state, where the mortgagee, in an action to foreclose, as it is called, is not confined in his remedy to the mortgaged property, but may also obtain a personal judgment, — the proceeding being *in personam* as well as *in rem*, — the doctrine of those authorities is not applicable. The conclusion to which we have arrived is supported by what is stated to have been the opinion of the equity court of appeals in *Gray v. Toomer*, 5 Rich. 266, where the law court of appeals

deemed it necessary to take the opinion of the court of equity.

Among the authorities cited in the argument here to support the ruling below there is one case in this state which requires some notice. It is the case of *Hatfield v. Kennedy*, 1 Bay, 492. That case was decided in 1793, long before the practice of allowing a mortgagee, in an action to foreclose his mortgage, to obtain a personal judgment for any balance that may remain unpaid after application of the proceeds of the sale of the mortgaged premises had been established, and cannot now be regarded as authority under such practice. Indeed, the question seems to have received but little consideration in that case, and the decision was rested solely on Lord Mansfield's ruling in *Burnell v. Martin*, *supra*, which, as we have seen, is not applicable here, owing to the radical change effected by our statute in the nature of a mortgage, and the marked difference between an action for strict foreclosure and an action to enforce the payment of a mortgage debt by a sale of the mortgaged premises.

As to the second question, we agree with his honor Judge Wallace in holding that the note sued on in the present action was not included in the former action to foreclose the mortgage. While it may be true that two or more notes given by the defendant to the plaintiff may be regarded as constituting but a single cause of action, as in *Holland v. Kemp*, 27 S. C. 623, and *Latimer v. Sullivan*, 80 Id. 111, it does not follow that they must necessarily be so regarded in every case. When the notes are payable at different times, and the holder desires to sue as soon as the first one matures, and before the others become payable, they must necessarily be treated as separate causes of action, as no action can be maintained on a note until after it becomes payable, except under the special circumstances provided for by statute, which have no application here. In this case, the note now sued on was not payable until the first day of November, 1887, and as the former action was commenced on February 3, 1887, we do not see how it could have been included in that action. Suppose that, at the hearing of the action for foreclosure of the mortgage, the defendant should be able to prove that the note for \$850, specially set out in the complaint in that action, was a forgery, or that the note had been paid or otherwise extinguished, how could any judgment be recovered in such action? The plaintiffs could not, in such event, have

claimed judgment upon any of the other notes, casually mentioned in the complaint, as representing part of the debt which the mortgage was intended to secure; for, besides the fact that the complaint contains no such allegations in regard to the other notes as would entitle the plaintiffs to demand judgment upon them, the more material difficulty would be that, as these other notes had not become payable at the time of the commencement of the former action, the action as to them would fail; for, as is said by Mr. Chief Justice Simpson in *Moon v. Johnson*, 14 S. C. 436, upon the authority of *Bank v. Manufacturing Co.*, 3 Strob. 190, "No party can recover in an action which was commenced when the cause of action had not accrued."

It is true that where a mortgage is given to secure a bond, with a penalty, conditioned for the payment of a certain sum of money at a future day, with interest payable annually, or in several installments at different times, an action may be commenced as soon as there is a default in payment of the first year's interest, or first installment, and provision may be made in the judgment for the payment of the subsequent annual interest, or subsequent installments, as they respectively become payable: *Brinckerhoff v. Thalhimer*, 2 Johns. Ch. 486; but that is upon the theory that the obligor is liable to judgment for the penalty so soon as there is default in performing any one of the conditions of the bond. What would be the proper mode of proceeding to render the mortgage available security for the payment of such of the notes as had not become payable when the action was commenced, in a case like the present, where the mortgage was not given to secure a bond with a penalty, but was given to secure sundry notes, some of which had not become payable when the action was commenced, we are not now called upon to consider, as no such question is presented in this case.

The judgment of this court is that the judgment of the circuit court be affirmed.

MORTGAGES. — Where a mortgagee elects to pursue his remedy by way of foreclosure in equity, if his application for an execution is refused, he cannot proceed by an action at law for its collection: *Shields v. Riopelle*, 63 Mich. 458. But a plaintiff may unite in one and the same action a demand for foreclosure, a judgment for the amount of the debt, and possession of the property: *Martin v. McNeeley*, 101 N. C. 634.

STEAMBOAT COMPANY v. RAILROAD COMPANY.

[80 SOUTH CAROLINA, 589.]

PUBLIC NUISANCE — REMEDY OF PRIVATE INDIVIDUAL. — The obstruction of a navigable river is a public nuisance, the remedy for which is by indictment; but an individual who has sustained any particular, special injury, over and above that sustained by the public generally, as the direct result of such obstruction, may also sustain a civil action to recover damages, and in this respect a plaintiff, though a chartered corporation, stands upon the same footing as any private individual.

PUBLIC NUISANCE — PLEADINGS BY PRIVATE PARTY SEEKING DAMAGES. — In an action by a private individual to recover damages for a public nuisance in obstructing the navigation of a navigable stream, the plaintiff must allege and prove a special and peculiar damage to his property, differing in kind from that sustained by the general public and resulting directly from the obstruction complained of. But expense incurred in seeking to overcome such obstruction is not such special injury as will support an action.

Smythe and Lee, for the appellants.

Brawley and Barnwell, contra.

McIVER, J. This was an action to recover damages for the obstruction of a navigable stream, and as the only question raised by the appeal is, whether sufficient facts are stated in the complaint to constitute a cause of action, it will be necessary to make a condensed statement of the allegations found in the complaint. After stating the corporate character of both plaintiffs and defendants, the allegations are, that the plaintiffs are engaged in the transportation of passengers and freight on the rivers and waters of this state by means of steamboats, of which they own a large number; that the Congaree River is a navigable stream, and is now, and has been for some time past, actually navigated by steamboats from a point near the city of Columbia to its junction with the Santee River; that the defendants are engaged in running a railroad, and in the prosecution of that enterprise have erected a bridge across the Congaree River, whereby the navigation of that stream is obstructed; that by reason of such obstruction the plaintiffs have been and are deprived of the free navigation of said stream; that upon demand, the defendants have refused to remove said obstruction, or to so alter and arrange the bridge constituting such obstruction, as to permit the free and unobstructed navigation of said stream. And in the eighth paragraph of the complaint the allegations are as follows: "That by reason of said wrongful and unlawful obstruction,

the plaintiffs have been prevented from freely navigating the said stream in the usual and ordinary course of their business; have been unable to freely transport freight and passengers on and along the same, as was their right; have been compelled to remove a portion of the upper works of one of their boats in order for it to pass under the said bridge, and then rebuild on the other side; have been forced to keep and maintain one of such boats permanently above the said bridge, and have sustained loss and other great injury in their business, to their damage ten thousand dollars."

The circuit judge held that the facts stated in the complaint were not sufficient to constitute a cause of action, and upon that ground rendered judgment dismissing the complaint. From this judgment the plaintiffs appeal upon the several grounds set out in the record, which need not be repeated here; for, as we shall see, there is really but a single question raised by the appeal.

There can be no doubt that the Congaree, being a navigable river, is a public highway, the obstruction of which constitutes a public nuisance, the remedy for which is by indictment, and that remedy, it seems, has already been applied in the case of this obstruction: *State v. South Carolina R'y Co.*, 28 S. C. 23. It is, however, true that an individual who has sustained any particular, special injury, over and above that sustained by the public generally, as the direct result of such obstruction, may also sustain a civil action to recover damages for such injury. In this respect the plaintiffs, though a chartered corporation, stand upon precisely the same footing as any private individual. Their rights are no greater and no less than those of an individual, and are to be tested by the same principles.

While it seems to be very generally, if not universally, conceded that in order to sustain such an action as this, the plaintiff must allege and prove some special, particular, or peculiar injury beyond that sustained by the public generally, yet it is not to be denied that there is a considerable conflict in the authorities elsewhere as to what will constitute such special, particular, or peculiar injury. Without going here into any detailed examination of the cases in England and other states, many of which we have examined, it seems to us that the true rule to be deduced from them is, that the injury must be particular,—as several of the cases express it, "special or peculiar,"—must result directly from the obstruction, and not

as a secondary consequence thereof, and must differ in kind, and not merely in degree or extent, from that which the general public sustains. This rule is fully supported by what few authorities we have in this state upon the subject.

The case of *Carey v. Brooks*, 1 Hill (S. C.), 365, upon which the circuit judge rested his conclusion, seems to be the leading case in this state. There, as here, the action was brought by a private individual to recover damages for a public nuisance in obstructing the navigation of a navigable stream, under the allegation that the plaintiff had incurred expense in clearing out the channel of the stream, and had suffered loss in transporting his lumber to market under a special contract to deliver it within a specified time. But the court, per Harper, J., held that the action could not be sustained, because the damage complained of was not such as would justify such an action, quoting the rule as laid down in Bacon's Abridgement, that "a particular damage, to maintain this action, ought to be direct, and not consequential," adding that "this seems to be the settled law, founded on the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many."

This case, so far from having been modified or shaken by any subsequent case, as contended by the distinguished counsel for appellants, has, we think, been expressly recognized, and must be regarded as furnishing the settled rule in this state. The first case to which our attention has been called as modifying *Carey v. Brooks*, *supra*, is *McLauchlin v. R. R. Co.*, 5 Rich. 583, but that case, so far from modifying, expressly recognizes and affirms it. Wardlaw, J., in delivering the opinion of the court, says (*Italics being ours*): "His complaint is of an unauthorized obstruction of public streets, and to sustain such a complaint a particular, direct damage must be shown," citing, among other authorities, the case of *Carey v. Brooks*, *supra*; and we are unable to find a single expression in *McLauchlin's* case which shows the least dissatisfaction with the rule as laid down in *Carey v. Brooks*, *supra*. It will be observed in *McLauchlin's* case that he claimed that his property lying adjacent to the obstruction complained of had been injured thereby, and if he had succeeded in showing this, he might possibly have recovered, upon the ground that this was a special and peculiar damage to his adjacent property, differing in kind from that sustained by the general public, and resulting directly from the obstruction complained

of, and not a secondary consequence thereof. It seems to us that Judge Wardlaw, in those portions of his opinion specially relied upon by counsel for appellants, was speaking of this aspect of the case, and the language used by him cannot be regarded as any modification whatever of the case of *Carey v. Brooks, supra*, which he had just cited, as laying down the rule upon which such an action as this rests.

The next case relied on by appellants is *Windham v. Rhame*, 11 Rich. 283; 73 Am. Dec. 116. In that case the only question before the court, and the only one considered, was, whether vindictive damages could be recovered in an action on the case for special damages incurred by plaintiff by the obstruction of a public highway. Although the defendant did give notice that he would renew his motion for a nonsuit on the ground that the damage proved in the case was not such as would sustain a private action, yet he abandoned that motion in the court of appeals, and hence that court had no occasion to consider, and did not consider, the question, and so far as we can discover there is not a word in the opinion which indicates the slightest dissatisfaction with the rule as laid down in *Carey v. Brooks, supra*.

The last case relied on is *Crouch v. Railway Co.*, 21 S. C. 495, but that case is so wholly different from the present that it is difficult to understand how any analogy can be drawn between them. In that case, the action was to recover damages for certain injuries sustained by the plaintiff's steamboat, called the Silver Star, in passing through the draw of a bridge erected by defendant across a navigable stream. No such question as is here presented either did or could have arisen in that case; for there the injury was the direct result of the obstruction, the plaintiff's boat having struck against the bridge in passing through the draw, which was alleged to be insufficient. That case, therefore, fell clearly within the rule. The injury complained of was special and peculiar to the plaintiff, different in kind from that sustained by the public generally, and was the direct result of the obstruction, and not a mere secondary consequence thereof. Indeed, the only controversy really made in that case was, whether the owner and officers of the Silver Star had been guilty of contributory negligence in attempting to pass through the draw of the bridge. That case was like the case of a traveler who, in attempting to pass an obstruction in a public highway, is thrown from his horse, or has his vehicle upset and broken, or his horses in-

jured, in which case a private action may unquestionably be maintained to recover damages for such injuries, for they are different in kind from those suffered by the general public, and are the direct result of the obstruction.

It is clear, therefore, that the only question in this case is, whether the complaint contains any allegation of such special or particular injury to the plaintiffs resulting directly from the obstruction of the Congaree River as, under the rule we have stated, is necessary to enable the plaintiffs to maintain such an action as this is. We agree with the circuit judge that there is no such allegation to be found in the complaint. The wrong of which it complains is a wrong done to the public generally in stopping the navigation of the river, and the plaintiffs have no more right to demand redress for that wrong than any other individual. They do not allege that any particular injury has been done to them by the defendants different in kind from that done to the public generally. The utmost that can be said is, that they allege, in the eighth paragraph of their complaint, that, with a view to obviate the injury which they, in common with the public, suffer from this public wrong of the defendants, they have voluntarily incurred certain expenses, and for this they claim damages from the defendants. But this is not the direct result of the obstruction, and at most is only a secondary consequence thereof, and cannot, therefore, be regarded as a sufficient basis for this action. If the fact that Carey had incurred expenses in attempting to remove the obstruction caused by the act of Brooks was held insufficient to enable him to maintain his action, we do not see how the fact that plaintiffs have incurred expenses in refitting their boats can entitle them to recover in this action.

The point raised in the argument as to the effect of the act of 1852 is not properly before us, as no such point was presented to or considered by the circuit judge. The only question which he was called upon to decide was, whether the facts stated in the complaint were sufficient to constitute a cause of action, and his judgment upon that question is all that we are entitled to review. We may add, however, that even were the point properly before us, we do not think it would avail the plaintiffs. The case, as made by the complaint, is not such a case as would entitle the plaintiffs to the special remedy provided by the act; and certainly there is nothing in the act which would give these plaintiffs any rights superior to those

of any private individual in bringing such an action as that now under consideration.

The judgment of this court is that the judgment of the circuit court be affirmed.

NUISANCES. — A private person can only abate a public nuisance when he is specially injured or damaged by its existence: *Brown v. De Groot*, 50 N. J. L. 409; 7 Am. St. Rep. 794, and cases collected in note 793.

PRIVATE ACTIONS FOR PUBLIC NUISANCES: See a general discussion upon this subject in an extended note to *Stetson v. Faxon*, 31 Am. Dec. 132-136; compare extended note to *Bowden v. Lewis*, 43 Am. Rep. 24-26.

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AGENCY.

1. **PRINCIPAL IS REQUIRED TO AFFIRM OR REPUDIATE CONTRACT OF AGENT IN ITS ENTIRETY.** — Where an agent sells the goods of his principal at an agreed price, to be paid for in services to be rendered to the agent by the purchaser, and the principal, with full knowledge of the facts, sues the purchaser in *assumpsit* for the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price. In such case, the principal might repudiate the entire contract, and recover the goods in an action of replevin, or their value in an action of trover, but he cannot adopt the contract in part without adopting it wholly. *Shoninger v. Peabody*, 88.

2. **RIGHTS AGAINST PRINCIPAL WHERE AGENCY IS CONCEALED.** — While a principal may take advantage of any contract made by his concealed agent, still where the principal agrees that the agency may be concealed, third parties contracting with the agent are entitled to all the equities and defenses which they would have had against the concealed agent, the same as if he had been the principal. *Rosser v. Darden*, 152.
3. **RIGHTS AGAINST PRINCIPAL WHERE AGENCY IS CONCEALED.** — Where an owner has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade or common understanding of the world, usually accompanies the authority of disposal, or has given the external *indicia* of the right of disposing of his property, he loses the right of following it. However the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it. *Id.*
4. **STATEMENTS AND ADMISSIONS OF AGENT ARE NOT ADMISSIBLE AGAINST HIS PRINCIPAL** unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment. Therefore, statements made by one of a plaintiff's attorneys, made after an attachment was sued out, are not admissible as against such plaintiff to show malice in suing out the writ. *Empire Mill Co. v. Lovell*, 272.

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1. **POUND-KEEPER MUST SHOW THAT HE HAS STRICTLY COMPLIED** with the law in order to successfully defend an action brought against him by the owner of an impounded animal. *Fort Smith v. Dodson*, 62.
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APPEAL AND ERROR.

1. **APPEAL BOND, CHATTEL MORTGAGE IN LIEU OF.** — There is no statute in North Carolina providing that a mortgage of real or personal property may be given in lieu of an undertaking on appeal from a judgment. Still, if the parties agree upon and execute a mortgage for such purpose, it is valid, and may be enforced as between them. *Comron v. Standland*, 797.
2. **ADMISSION OF EVIDENCE OMITTED BY OVERSIGHT, PRESUMPTION IN FAVOR OF.** — Where the trial court permits the plaintiff, after he has rested his case, to introduce further evidence, on the ground of oversight, the

appellate court will, in the absence of evidence to the contrary, presume that the court found it to be a case of oversight or inadvertence, and so admitted the evidence under the statute authorizing its admission in such a case. *Randolf v. Bloomfield*, 268.

3. AN EXCEPTION TO A DECISION OF A COURT in overruling an offer of evidence must state the grounds upon which the offer was made, and when the offer is made for a certain purpose, and the evidence is rejected, the litigant who excepts to the ruling of the trial court will not be heard in a court of review to insist that the facts offered to be proved would have been competent evidence upon an issue of fact not distinctly presented by the offer. *Dale v. See*, 688.
4. WHEN THE DAMAGES AWARDED are not excessive, nor the verdict contrary to law or the evidence, the judgment of the lower court will not be disturbed. *Savannah etc. R'y Co. v. Flannagan*, 183.
5. IN AN ACTION AGAINST A RAILROAD COMPANY for damages, it is error to admit evidence of the master-machinist against the company, given at a former trial, when he may be produced as a witness; but unless such evidence is sufficiently material, a new trial will not be granted. *Id.*
6. ADMISSION OF INADMISSIBLE EVIDENCE is not ground for a new trial when it does not prejudice the party complaining. *Id.*
7. OPINION OF COURT UPON FACTS admitted or conceded to be true is not error. *Id.*
8. ADMISSION OF IRRELEVANT TESTIMONY, WHICH COULD NOT HAVE PRODUCED POSSIBLE PREJUDICE, is not ground for reversal. *Empire Mill Co. v. Lovell*, 272.
9. INCONSISTENT INSTRUCTIONS. — Though there is a seeming inconsistency in the instructions, the judgment will not be reversed when there is a general instruction fairly submitting the case to the jury, and it is clear, from the evidence, that their verdict is right. *Barry v. Hannibal etc. R'y Co.*, 610.
10. ERROR IN OVERRULING MOTION TO MAKE PETITION MORE SPECIFIC WAIVED WHEN. — A defendant who answers after his motion for an order requiring the plaintiff to make the petition more specific has been denied thereby waives the error, if any there was, in overruling the motion. *Randolf v. Town of Bloomfield*, 268.

ARBITRATION AND AWARD.

1. AWARD OF ARBITRATORS AS TO THE RENTAL VALUE of property will not be set aside, in the absence of proof of fraud or misconduct in the arbitrators or of gross mistake on their part. *Brush v. Fisher*, 510.
2. AWARDS ARE FAVORED IN LAW and reluctantly set aside. Every presumption is made in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof. *Id.*
3. ERROR OF FACT OR LAW MADE BY ARBITRATORS in their award does not avoid it, unless such error is so gross as to be of itself clear proof of corruption and fraud. *Id.*
4. RIGHT TO OBJECT TO SELECTION OF THIRD ARBITRATOR BY LOT is waived by assenting to the selection and proceeding to trial with knowledge of the facts. *Id.*
5. ARBITRATORS ARE EXPECTED TO FRAME THEIR DECISION on broad views of justice, which may sometimes deviate from strict rules of law. The

utmost good faith in the discharge of their duties will be presumed, and their award will not be disturbed without clear proof of corruption, partiality, or misconduct on their part. *Id.*

ARREST.

LIABILITY FOR UNLAWFUL ACT OF ONE OF SEVERAL ENGAGED IN A LAWFUL PURPOSE. — Where two or more are acting lawfully together in the furtherance of a common lawful purpose, as making an arrest of one charged with crime, neither is liable for the unlawful act of another, done in furtherance of the common purpose, without his concurrence. *Wert v. Potts*, 252.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS NOT VOID BECAUSE IT HINDERS or delays creditors, if such delay is no longer than is necessary for the execution of the trust, which it properly declares. *Arnold Hagerman*, 712.

See CONFLICT OF LAWS, 3, 4; PARTNERSHIP, 6, 7.

ASSUMPSIT.

ASSUMPSIT FOR STOLEN MONEY. — The custodian of stolen money, who received it without knowing it to have been stolen, but who, after notice that it was stolen, and that plaintiff claimed it, paid it over on the order of the thief, is liable to the plaintiff in *assumpsit* therefor. *Hindmarch v. Hoffman*, 842.

ATTACHMENT AND GARNISHMENT.

1. **LEVY OF ATTACHMENT ON THE DEFENDANT'S BOOKS OF ACCOUNT IS A LEVY ONLY ON THE MATERIALS** of which they are composed, and not upon the credits or accounts therein set forth. *Goodbar v. Lindsley*, 54.
2. **SHERIFFS — DUTY AS TO ATTACHED PROPERTY.** — A sheriff, after he has seized property under attachment, must take care of it; and if he fails to do so, he and his sureties are liable therefor; but a bond of indemnity neither increases nor lessens liability in this respect. *Smocky v. Peters-Calhoun Co.*, 575.
3. **SHERIFF. — LIABILITY OF SURETIES ON INDEMNIFYING BOND** does not depend upon the negligence or misconduct of the sheriff in keeping attached property. Their only liability is for the consequences resulting from the lawful discharge of the sheriff's duty in seizing the property and appropriating it to the payment of the attaching creditor's debts. *Id.*
4. **DUTY OF THIRD PARTY TO CLAIM HIS GOODS.** — A third party, whose goods are intermixed with defendant's when the whole are attached, and who claims the whole stock of goods, but fails to point out or give notice to the sheriff of what particular portion belongs to him until the trial of the issue, is not entitled to damages for his part of the goods seized and held by the sheriff. *Id.*
5. **INDEMNIFYING BOND — DEFENSE OF SURETIES.** — Whatever would be a good defense for a sheriff if no indemnifying bond in attachment had been given, is a good defense for those who, by such bond, have assumed his liability. *Id.*

6. GARNISHMENT will not lie against personal property in transit and outside the state, but in the custody of a common carrier whose residence is within the state. In such case the *situs* of the property does not follow the residence of the garnishee. *Montrose Pickle Co. v. Dodson etc. Mfg. Co.*, 213.
 7. DAMAGES. — IF AN ATTACHMENT IS MALICIOUSLY SUED OUT, the defendant cannot recover damages therefor, unless he has suffered some injury therefrom. *Goodbar v. Lindsley*, 54.
 8. THE DAMAGES WHICH MAY BE RECOVERED FOR A MALICIOUS ATTACHMENT must be restricted to injury done by the writ, without regard to what it may have, by its example, induced another creditor to do. Hence the defendant cannot recover for a malicious attachment because it occasions some of his judgment creditors to issue executions on their judgments, and to seize and sell his property thereunder, as they have the right to do. *Id.*
 9. DAMAGES RECOVERABLE FOR MALICIOUS ATTACHMENT DO NOT INCLUDE EXPENSES incurred by the defendant in prosecuting an action to recover such damages. *Id.*
 10. WRONGFUL ATTACHMENT, MEASURE OF DAMAGES FOR. — If a debtor's goods are wrongfully seized and sold under an attachment, and the proceeds of the sale are applied in satisfaction of a judgment obtained against him by another creditor, the measure of his damages for the wrongful attachment is not the value of the property at the time of the seizure, but the difference between that value and the amount realized from the sale. *Empire Mill Co. v. Lovell*, 272.
- See EXEMPTIONS; LIMITATION OF ACTIONS, 5; NEGOTIABLE INSTRUMENTS, 5.

BAILMENTS.

1. UPON A BAILMENT OF GOODS FOR WORK AND LABOR TO BE DONE THEREON BY THE BAILER, THE CONTRACT BETWEEN THE PARTIES ARISES IMMEDIATELY upon the delivery of the goods to the bailee, and he cannot afterwards impose conditions, nor limit his liability resulting from such bailment. *Dale v. See*, 688.
2. NOTICE BY BAILER, WHEN HE RETURNS GOODS UPON WHICH HE HAS DONE WORK, THAT HE WILL NOT BE ANSWERABLE FOR ANY DAMAGES OCCASIONED BY UNSKILLFUL WORKMANSHIP, unless a claim therefor is made within a specified time, is ineffectual. The fact that the bailee accepted the goods with knowledge of the terms thus sought to be imposed by the bailer is immaterial. No contract can arise from such acceptance, because there is no consideration to support it. Though several such notices be given, each of them is a nullity, and no contract can result from them that the bailee will present his claims for damages within the time specified. *Id.*

See CARRIERS.

BANKRUPTCY AND INSOLVENCY.

NOTE GIVEN UNDER AGREEMENT BETWEEN CREDITOR AND DEBTOR prior to the latter's discharge in bankruptcy, by which the latter is to give the former his notes for the balance of the creditor's debt, and based on no other consideration, is fraudulent and void. *Tinker v. Hurst*, 482.

See BANKS AND BANKING, 5, 6.

BANKS AND BANKING.

1. **BANK IS BOUND TO KNOW STATE OF ITS DEPOSITOR'S ACCOUNT;** and if it makes a mistake in this respect, it must abide the consequences. *Manufacturers' Nat. Bank v. Swift*, 381.
2. **PRESENTATION OF CHECK IS DEMAND FOR PAYMENT THEREOF;** and if it is paid, all the rights of the payee have been satisfied, and he has no right to ask any questions. *Id.*
3. **PAYMENT OF CHECK BY BANK IS REGARDED AS FINALITY,** in the absence of fraud on the part of the holder; and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder. *Id.*
4. **ACCEPTANCE OF DRAFT BY TELEGRAM.** — One who promises in advance to accept or pay a bill of exchange is bound by such promise only when the bill conforms to the terms of the offer; hence when the drawee telegraphed to the drawer that he would pay a draft in the payee's favor for two thousand dollars, he is not bound to pay such draft drawn for two thousand dollars with exchange on New York, because this is equivalent to a draft for two thousand and two dollars. *Lindley v. First Nat. Bank*, 254.
5. **INSOLVENT BANK — RIGHTS OF DEPOSITORS.** — Where the condition of a bank is so hopelessly insolvent that one of the managing partners absconds, and the other, with equal opportunities for information concerning its condition, continues to receive deposits, it does not devolve upon depositors, seeking to rescind a sale of paper to the bank, to show that the remaining partner was privy to the flight of the other. The fraud is sufficiently proved by showing that the circumstances were such that the remaining partner must have known of the insolvency of the bank, and that the depositor could not be paid. *First Nat. Bank v. Strauss*, 579.
6. **ONE BANK BY SENDING TO ANOTHER an indorsed draft for collection** does not thereby constitute the latter a holder for value, though the sending bank is indebted to the other, and has become insolvent after the draft was sent, but the indorser and depositor of the draft, when he obtains notice of the insolvency of the forwarding bank, may stop payment, and recover the proceeds of the draft if it has been paid. *Id.*

See **NEGOTIABLE INSTRUMENTS; USAGES AND CUSTOMS**, 1.

BONA FIDE PURCHASERS.

WHO IS NOT. — If a purchaser in any manner receives notice of prior adverse rights in and to the subject-matter before he has fully acquired or perfected his own interest under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration. *Arnold v. Hagerman*, 712.

See **ASSUMPSIT; CHATTEL MORTGAGES**, 1-3; **CORPORATIONS**, 6-9; **JUDGMENTS**, 6; **NEGOTIABLE INSTRUMENTS**, 5, 11, 14; **NOTICE**, 4.

BONDS.

See **ATTACHMENT AND GARNISHMENT; EXECUTORS AND ADMINISTRATORS**, 3;
OFFICIAL BONDS.

BURDEN OF PROOF.

See **EVIDENCE**, 1.

CARRIERS.

1. **FREIGHT OVER CONNECTING LINE.** — Where, under a written contract with a carrier for the transportation of freight over his own and a connecting line for which he is not the agent, the shipper prepays the freight asked for the whole distance, but the amount paid over the connecting line is less than that fixed by its schedule, the latter has a lien for its additional freight, and, upon the arrival of the goods at their destination, may refuse to deliver them until it is paid, although it is shown the contract, and has notice from the way-bill that the freight asked was prepaid, and, under allegations of unreasonable delay in transportation, and subsequent detention, as matter in aggravation of the alleged wrongful refusal to deliver the goods, the plaintiff is not entitled to recover, in the absence of proof of unreasonable delay in transportation. *Crossan v. New York etc. R. R. Co.*, 408.
2. **LIABILITY OF, FOR INJURIES CAUSED BY ACT OF FELLOW-PASSENGER.** — A passenger cannot recover for personal injuries received in attempting to alight from a train which was moving away from his station without having stopped long enough to allow him to get off, when he knew before attempting to alight that the movement of the train was caused by the unauthorized act of a fellow-passenger in so pulling the bell-cord as to signal the engineer to start. *Mississippi R. R. Co. v. Harrison*, 573.
3. **CONTRIBUTORY NEGLIGENCE — DAMAGES — INJURY FROM ATTEMPTING TO RIDE ON LOCOMOTIVE.** — One who attempts to board a locomotive attached to a freight train on a railroad devoted exclusively to the transportation of freight, by invitation of the conductor, and for his own convenience, does not acquire the rights of a passenger, even if he has previously ridden on the locomotive by similar invitation, and has seen other servants of the corporation do the same, so as to recover damages for personal injuries, in the absence of proof that the conductor had general or special authority to take plaintiff or other passengers on his engine. *Files v. Boston etc. R. R. Co.*, 411.
4. **CONTRIBUTORY NEGLIGENCE.** — ONE WHO TAKES AN EXPOSED POSITION upon a train not designed for the use of passengers assumes the special risks of that position, whether he takes it by the license, non-interference, or express permission of the conductor. *Id.*
5. **CONTRIBUTORY NEGLIGENCE.** — PASSENGER ON RAILROAD TRAIN, who, after reaching his station where the train stops the usual time, attempts to alight after the train has again started, and after the brakeman has warned him not to make the attempt, is guilty of contributory negligence, and cannot recover for an injury so received, and the jury should be so instructed. *New York etc. R. R. Co. v. Enches*, 848.

See EXPRESS COMPANIES.

CHARITABLE USES.

See WILLS, 30-34.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE VALID AS TO SHERIFF HAVING ACTUAL NOTICE, THOUGH DEFECTIVE IN DESCRIPTION OF PROPERTY.** — Though a chattel mortgage may be so defective in its description of the property mortgaged as not to constitute sufficient notice to a purchaser, it will be valid as to a

- sheriff who has actual notice of the mortgage before levying upon the property. *Cole v. Green*, 283.
2. **DESCRIPTION OF PROPERTY IN.** — The record of a chattel mortgage which recites that the property mortgaged is "one sorrel horse three years old," and then further recites that the mortgagor is a resident of a certain county, and in case of foreclosure the property is to be sold in that county, is insufficient to impart constructive notice to third persons. *Barrett v. Fiech*, 238.
 3. **BURDEN OF PROOF RESPECTING NOTICE OF.** — In an action by a purchaser from the mortgagor against the mortgagee of personal property, where the defendant depends upon the theory that his right to the property depends upon whether the record of the mortgage imparts constructive notice, the burden of proof is not on plaintiff to show that he did not have actual notice of the mortgage when he purchased the property. *Id.*
 4. **NO PARTICULAR FORM IS ESSENTIAL** to a chattel mortgage, nor will mere informality defeat its purpose. It need not be under seal, and it is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed, and such mortgage may or may not have a power of sale annexed thereto. This rule is here applied to an informal chattel mortgage given in lieu of an appeal bond, and in consideration of a stay of execution. *Cowen v. Standland*, 797.
 5. **WHETHER OR NOT A WRITING** was intended by the parties as a chattel mortgage is a question of law to be determined by the court. *Id.*
 6. **CONSIDERATION.** — **STAY OF EXECUTION** is a valuable and sufficient consideration to support a chattel mortgage. *Id.*

CIVIL RIGHTS.

1. **BY CIVIL RIGHTS IS MEANT** those rights which the municipal law enforces at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. Among these rights is the right to prosecute and defend actions in the courts of the state according to the established rules of practice. *Percey v. Powers*, 693.
2. **THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF** is a civil right. *Id.*
3. **RELIGIOUS PRINCIPLES ARE THOSE SENTIMENTS** concerning the relations between God and man which may influence human conduct. *Id.*
4. **THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF CANNOT BE DENIED** on the ground that he does not believe that God will punish perjury, if the constitution of the state declares that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles." *Id.*

See CONSTITUTIONAL LAW, 1.

CONFLICT OF LAWS.

1. **NO STATE WILL ENFORCE PENALTIES IMPOSED BY LAWS OF OTHER STATES.** Where, therefore, a statute of New York provides that "if any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers

who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," the liability imposed by this statute, being a penalty, cannot be enforced in Maryland, nor can an action be maintained in Maryland upon a judgment for such penalty recovered in the state of New York. *Attrill v. Huntington*, 344.

2. **THE LEGITIMIZING OF A CHILD BY THE MARRIAGE OF ITS PARENTS** subsequently to its birth in the state of their and its domicile has the effect of legitimizing it in another state, and conferring upon it the capacity to inherit realty in the latter state, as if it had been born in lawful wedlock. *Dayton v. Adkisson*, 763.

3. **ASSIGNMENT MADE IN NEW YORK** and legal there, and not intended to take effect in Georgia, is admissible in evidence in the latter state to show the right of the assignee to debts due the assignor there, though there is no schedule and list of creditors attached to the assignment, as required by the statute of the latter state. *Birdseye v. Underhill*, 142.

4. **FOREIGN ASSIGNMENT.**—While if a contract contravenes the policy of the law of Georgia it will be held void in that state, still the statute requiring schedules to be annexed to a deed of assignment does not make such schedules a part of the contract, nor does such statute apply to contracts or assignments made outside the state. *Id.*

See **INJUNCTION**, 1; **LIMITATION OF ACTIONS**, 1.

CONSPIRACY.

See **CRIMINAL LAW**, 17.

CONSTITUTIONAL LAW.

1. **STATUTE PROVIDING SEPARATE ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS.**—A statute providing "that all railroads carrying passengers within this state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger-cars for each passenger train, or by dividing the passenger-cars by a partition, so as to secure separate accommodations," and also providing that any railroad failing to comply with such requirements shall be deemed guilty of a misdemeanor, is constitutional, and not in conflict with section 8 of article 1 of the United States constitution, regarding the regulation of interstate commerce, so far as such statute applies to the transportation of passengers within the state, although the railroad indicted extends through different states, and is engaged in carrying interstate passengers. *Louisville etc. R'y Co. v. State*, 599.

2. **JURY TRIAL, RIGHT TO.**—A statute conferring jurisdiction in equity upon certain courts on information filed by the district attorney, or upon the petition of ten legal voters of any town or city, setting forth that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and declaring that such injunction may issue by any justice of either of the courts named, is constitutional, and does not violate the right of trial by jury, nor deprive an offender of his property without due process of law. *Carlton v. Rugg*, 446.

See **CIVIL RIGHTS**; **RAILROAD COMPANIES**, 2; **STATUTES**; **USURY**, 4.

CONTEMPT

CONTEMPT, WHEN DEEMED IN PRESENCE OF THE COURT. — COURT IS NOT DISSOLVED by a mere recess or adjournment from day to day, and misbehavior affecting public justice, in the court-house and in the immediate presence of the judge, where he is attending, ready to resume business when the hour of recess expires, especially by a suitor, is misbehavior in the presence of the court, and may be punished summarily as a contempt of court. *Baker v. State*, 192.

See INSURANCE, 5.

CONTRACTS.

1. **CONSTRUCTION — SATISFACTORY COMPLETION.** — Under a written contract to "furnish and set up in complete and first-class working order" a system of heating apparatus under certain expressed requirements, and if every portion of the buildings are not properly heated upon the completion of the system in accordance with the requirements, upon ten days' notice thereof, and if they are not so heated within ten days thereafter, the entire system to be removed at the expense of plaintiff, and in the event of the satisfactory completion of the system in accordance with the requirements, the price to be paid "after such acknowledgment has been made by the owner, or the work demonstrated," the satisfactoriness of the system and the risk taken by the plaintiff are to be determined by the mind of a reasonable man, by the external measures set forth in the contract, and not by the private taste or liking of the defendant. *Hawkins v. Graham*, 422.
2. **CONTRACT WILL NOT BE CONSTRUED LITERALLY** when such construction will defeat the general intention of the parties, as evidenced by the contract itself. *Chism v. Schipper*, 668.
3. **ARCHITECT OR ARBITRATOR, FRAUDULENT REFUSAL OF, TO GRANT CERTIFICATE.** — Though a building contract declares that the work shall be done to the satisfaction of a specified architect, to be evidenced by his certificate, that if the owner requests alterations, additions, or omissions, their reasonable value shall be added to or deducted from the contract price, and that in case a dispute arises, such architect is to decide the same, and that his decision shall be final, if certain alterations are contracted for by the owner, and made by the contractor, which the architect willfully and fraudulently decides to be within the contract and specifications, and fraudulently refuses to grant the certificate provided for by the contract, and fraudulently decides that the contractor is not entitled to payment therefor, he may maintain an action on such contract, and recover the amount to which he can show himself entitled thereunder. *Id.*
4. **ACCEPTANCE.** — PARTY IS LIABLE FOR THE PRICE OF PRINTING done under his order and subject to his "acceptance of a finished proof," where, after he has been furnished with a printed copy of his manuscript, he marks the proof "O. K.," with directions to "go ahead and print," and this, although after the whole matter is printed a material misprint is discovered therein, which was overlooked both by the printer and by himself, and made a material difference between the manuscript and the printed proof. *Giles Lithographic etc. Co. v. Chase*, 439.
5. **PENALTY OR LIQUIDATED DAMAGES.** — A stipulation in a contract for the sale of interest and good-will in an omnibus business, that the

seller will not again engage in, or use his influence in opposition to the buyer in, the same business, and that each party is "bound in the sum of three hundred dollars for the faithful fulfillment of the above contract," is a penalty, and not liquidated damages, and upon breach of the contract by the seller, the buyer may recover his actual damages sustained, which may be computed by the number of passengers carried at regular rates by the seller after violation of his contract. *Moore v. Colt*, 845.

6. **OPTIONAL CONTRACT, DAMAGES RECOVERABLE FOR BREACH OF.** — Where one party contracts to sell and deliver to another from three hundred to five hundred tons of phosphate during a certain month, and the latter agrees to give ample notice of his wants twenty-four hours ahead of the time specified for the delivery of each order, and three hundred tons are delivered under the contract, if the purchaser then notifies the seller that he will exercise his option to take the remaining two hundred tons, and requests the seller to deliver the same, but the latter refuses to do so, the buyer may recover damages in a court of law for breach of the contract. *Dambmann v. Rittler*, 364.
7. **RESCISSION OF CONTRACT.** — A REPRESENTATION MADE IN A CASUAL CONVERSATION by one partner to another, to the effect that he was worth thirty thousand dollars above his debts, is no ground for the rescission of a contract made by him some time afterwards, and not in contemplation when the conversation took place, with his partner, for a transfer to him of the partnership assets, in consideration that he would assume the partnership indebtedness, though subsequent developments showed that he was not in fact worth anything in excess of his obligations. *Arnold v. Hagerman*, 712.
8. **RESCISSION OF CONTRACT.** — PROMISES HONESTLY MADE, which the promisor is unable to fulfill, do not furnish sufficient grounds for vacating a contract based thereon. *Id.*
9. **RESCISSION.** — GRANTORS CANNOT AVOID A TRANSFER on account of a fraudulent purpose on the part of the grantee, if they had notice of the facts and circumstances from which such purpose is inferred. *Id.*
10. **RESCISSION.** — ELECTION TO RESCIND A CONTRACT ON THE GROUND OF FRAUD must be made promptly upon discovering the fraud. If any act is done by the complaining party after discovering the alleged fraud towards perfecting or carrying out the contract, it is an irrevocable election to abide by the contract. *Id.*

See ACCORD AND SATISFACTION, 1, 2; SCHOOLS, 1.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE; NUISANCES, 5.

CORPORATIONS.

1. **EXISTENCE OF A PUBLIC CORPORATION DE FACTO, IF NOT DE JURE, CANNOT BE CALLED IN QUESTION** by an information in the nature of a *quo warranto* filed in the name of the attorney-general, at the instance of private relators. *State v. Vickers*, 675.
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in a collateral proceeding to contradict the records of a public corporation, which are required by law to be kept in writing, or to show a mistake therein as recorded. Where, therefore, the records of the annual meeting of the electors of a school district, and of a subsequent meeting of the directors of the district, show that certain orders for the payment of money were issued upon the authority of those bodies, parol evidence to show that no such action was taken by the electors at the annual meeting, and that the minutes of the meeting of directors were written by a member who was not the secretary, and who signed the names of the other directors thereto, is not admissible in an action brought against the district to recover therefrom the amount of the orders. *Everts v. District Township*, 264.

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CO-TENANCY

1. **CONVEYANCE BY CO-TENANT.** — If several pieces of land are held in common by the same persons, either may convey his interest in each parcel. *Shepherd v. Jernigan*, 50.
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CRIMINAL EVIDENCE

See CRIMINAL LAW.

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12. **EVIDENCE INCOMPETENT WHEN OFFERED MAY BE MADE COMPETENT** by the subsequent act of the state by its instructions changing the theory of its prosecution. *Jones v. State*, 570.
13. **ABORTION — EVIDENCE ADMISSIBLE ON TRIAL FOR PROCURING.** — On a trial upon an indictment which charges that the defendant "did knowingly use and cause to be used certain means" for the purpose of unlawfully causing the miscarriage and abortion of a certain female, a letter written by him to her, containing instructions as to how she should take a bottle of ergot which he sent with it, and proof by her that she took the drug so sent to her by him, and in other respects also followed the instructions given by him, are admissible in evidence, although he was not present when she took the drug, and did the other things which he instructed her to do; and so, also, is a conversation between him and her, in which she told him, upon his charging her with not having complied with his instructions contained in his letters, that she had done so, but without producing the desired effect. *Jones v. State*, 362.
14. **ADULTERY.** — Under a statute defining adultery to be "the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person," it is proper to charge that, to constitute the crime, where the parties are not charged as living together, the testimony must satisfy the jury, beyond a reasonable doubt, that the criminal intercourse was habitual, — that is, frequent; and that occasional acts will not be sufficient; and it is also proper to decline to define "habitual carnal intercourse," leaving it to the jury to say how frequent the acts must be to make them habitual. *State v. Carroll*, 888.
15. **ADULTERY.** — Where two are jointly indicted for adultery, and only one is arrested, that one may be legally tried and convicted alone. *Id.*
16. **ADULTERY — INDICTMENT.** — Under a statute defining adultery to be "the living together and carnal intercourse with each other, or habitual

carual intercourse with each other without living together, of a man and woman," etc., the omission from the indictment of the words "without living together" does not vitiate it. *Id.*

17. CONSPIRACY IS THE AGREEING OR CONFEDERATING together by two or more persons to commit some crime or misdemeanor. Such confederation or agreement is itself the offense, and no overt act is necessary. *State v. Setter*, 121.
18. FALSE PRETENSES — SUFFICIENCY OF INDICTMENT FOR. — An indictment for false pretenses is not demurrable because it fails to set out the false pretenses intended to be relied upon; but the indictment, in other respects, must have that degree of certainty and precision that will fully inform the accused of the special character of the charge against which he is called upon to defend, that will enable the court to determine whether the facts alleged, upon the face of the indictment, are sufficient to constitute a crime, and that will protect him against further prosecution for the same alleged offense. *State v. Blizzard*, 366.
19. INDICTMENT MUST GIVE PURPORT OF INSTRUMENT ALLEGED TO HAVE BEEN OBTAINED BY FALSE PRETENSES, or some other proper designation thereof, so that there can be no mistake as to the identification of the instrument described with that produced in evidence in support of the indictment. *Id.*
20. INDICTMENT FOR OBTAINING "BILL OF SALE OR MORTGAGE OF PERSONAL PROPERTY" BY FALSE PRETENSES, where it does not aver that the instrument was assigned or transferred to the accused by the owner, or that something more passed to the accused than the mere paper upon which the instrument was written. *Id.*
21. INDICTMENT LACKS SUFFICIENT CERTAINTY AND PRECISION which describes the instruments alleged to have been obtained by false pretenses as certain valuable securities, to wit, the indorsement and signature to two certain promissory notes for the payment of three hundred dollars each. The offense contemplated by the statute is the obtaining by false pretenses of a subsisting security, and not merely the obtaining of a signature to an instrument. *Id.*
22. OWNERSHIP OF PROPERTY OR SECURITIES MUST BE DISTINCTLY ALLEGED IN INDICTMENT for obtaining them by false pretenses. Such an averment is as necessary as in an indictment for larceny. *Id.*
23. HOMICIDE IN RESISTING ILLEGAL ARREST. — A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him; and if resistance by lawful means results in the death of the assailant, it is excusable homicide; if by unlawful means, but without malice, it is manslaughter; if by unlawful means, prompted by hate and malice, and death in cool blood is intended, it is murder in the first degree. *State v. Scheele*, 106.
24. KILLING FLEEING FELON. — Under the common law, and section 2878 of the Mississippi code, it is lawful to kill a fleeing felon when he cannot otherwise be taken, and the necessity for such killing is for the jury to determine. *Jackson v. State*, 542.
25. KILLING FLEEING FELON — JUSTIFICATION OF OFFICER. — An officer who kills one for whom he has a warrant of arrest for felony must satisfy the jury that he tried in good faith, and with reasonable prudence and caution, to make the arrest, and was unable, because of the flight of the person, to secure him; that he killed him when other

- sheriff who has actual notice of the mortgage before levying upon the property. *Cole v. Green*, 283.
2. **DESCRIPTION OF PROPERTY IN.** — The record of a chattel mortgage which recites that the property mortgaged is "one sorrel horse three years old," and then further recites that the mortgagor is a resident of a certain county, and in case of foreclosure the property is to be sold in that county, is insufficient to impart constructive notice to third persons. *Barrett v. Fiech*, 238.
 3. **BURDEN OF PROOF RESPECTING NOTICE OF.** — In an action by a purchaser from the mortgagor against the mortgagee of personal property, where the defendant depends upon the theory that his right to the property depends upon whether the record of the mortgage imparts constructive notice, the burden of proof is not on plaintiff to show that he did not have actual notice of the mortgage when he purchased the property. *Id.*
 4. **NO PARTICULAR FORM IS ESSENTIAL** to a chattel mortgage, nor will mere informality defeat its purpose. It need not be under seal, and it is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed, and such mortgage may or may not have a power of sale annexed thereto. This rule is here applied to an informal chattel mortgage given in lieu of an appeal bond, and in consideration of a stay of execution. *Conron v. Standland*, 797.
 5. **WHETHER OR NOT A WRITING** was intended by the parties as a chattel mortgage is a question of law to be determined by the court. *Id.*
 6. **CONSIDERATION.** — **STAY OF EXECUTION** is a valuable and sufficient consideration to support a chattel mortgage. *Id.*

CIVIL RIGHTS.

1. **BY CIVIL RIGHTS IS MEANT** those rights which the municipal law enforces at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. Among these rights is the right to prosecute and defend actions in the courts of the state according to the established rules of practice. *Percey v. Powers*, 693.
2. **THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF** is a civil right. *Id.*
3. **RELIGIOUS PRINCIPLES ARE THOSE SENTIMENTS** concerning the relations between God and man which may influence human conduct. *Id.*
4. **THE RIGHT OF A PARTY TO TESTIFY IN HIS OWN BEHALF CANNOT BE DENIED** on the ground that he does not believe that God will punish perjury, if the constitution of the state declares that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles." *Id.*

See CONSTITUTIONAL LAW, 1.

CONFLICT OF LAWS.

1. **NO STATE WILL ENFORCE PENALTIES IMPOSED BY LAWS OF OTHER STATES.** Where, therefore, a statute of New York provides that "if any certificate or report made or public notice given by the officers of any such corporation shall be false in any material representation, all the officers

who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," the liability imposed by this statute, being a penalty, cannot be enforced in Maryland, nor can an action be maintained in Maryland upon a judgment for such penalty recovered in the state of New York.

Attrill v. Huntington, 344.

2. **THE LEGITIMIZING OF A CHILD BY THE MARRIAGE OF ITS PARENTS** subsequently to its birth in the state of their and its domicile has the effect of legitimizing it in another state, and conferring upon it the capacity to inherit realty in the latter state, as if it had been born in lawful wedlock.

Dayton v. Adkisson, 763.

3. **ASSIGNMENT MADE IN NEW YORK** and legal there, and not intended to take effect in Georgia, is admissible in evidence in the latter state to show the right of the assignee to debts due the assignor there, though there is no schedule and list of creditors attached to the assignment, as required by the statute of the latter state. *Birdseye v. Underhill*, 142.

4. **FOREIGN ASSIGNMENT.** — While if a contract contravenes the policy of the law of Georgia it will be held void in that state, still the statute requiring schedules to be annexed to a deed of assignment does not make such schedules a part of the contract, nor does such statute apply to contracts or assignments made outside the state. *Id.*

See **INJUNCTION**, 1; **LIMITATION OF ACTIONS**, 1.

CONSPIRACY.

See **CRIMINAL LAW**, 17.

CONSTITUTIONAL LAW.

1. **STATUTE PROVIDING SEPARATE ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS.** — A statute providing "that all railroads carrying passengers within this state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger-cars for each passenger train, or by dividing the passenger-cars by a partition, so as to secure separate accommodations," and also providing that any railroad failing to comply with such requirements shall be deemed guilty of a misdemeanor, is constitutional, and not in conflict with section 8 of article 1 of the United States constitution, regarding the regulation of interstate commerce, so far as such statute applies to the transportation of passengers within the state, although the railroad indicted extends through different states, and is engaged in carrying interstate passengers.

Louisville etc. R'y Co. v. State, 599.

2. **JURY TRIAL, RIGHT TO.** — A statute conferring jurisdiction in equity upon certain courts on information filed by the district attorney, or upon the petition of ten legal voters of any town or city, setting forth that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and declaring that such injunction may issue by any justice of either of the courts named, is constitutional, and does not violate the right of trial by jury, nor deprive an offender of his property without due process of law. *Carleton v. Rugg*, 446.

See **CIVIL RIGHTS**; **RAILROAD COMPANIES**, 2; **STATUTES**; **USURY**, 4.

CONTEMPT

CONTEMPT, WHEN DEEMED IN PRESENCE OF THE COURT. — COURT IS NOT DISSOLVED by a mere recess or adjournment from day to day, and misbehavior affecting public justice, in the court-house and in the immediate presence of the judge, where he is attending, ready to resume business when the hour of recess expires, especially by a suitor, is misbehavior in the presence of the court, and may be punished summarily as a contempt of court. *Baker v. State*, 192.

See INSURANCE, §.

CONTRACTS.

1. **CONSTRUCTION — SATISFACTORY COMPLETION.** — Under a written contract to "furnish and set up in complete and first-class working order" a system of heating apparatus under certain expressed requirements, and if every portion of the buildings are not properly heated upon the completion of the system in accordance with the requirements, upon ten days' notice thereof, and if they are not so heated within ten days thereafter, the entire system to be removed at the expense of plaintiff, and in the event of the satisfactory completion of the system in accordance with the requirements, the price to be paid "after such acknowledgment has been made by the owner, or the work demonstrated," the satisfactoriness of the system and the risk taken by the plaintiff are to be determined by the mind of a reasonable man, by the external measures set forth in the contract, and not by the private taste or liking of the defendant. *Hawkins v. Graham*, 422.
2. **CONTRACT WILL NOT BE CONSTRUED LITERALLY** when such construction will defeat the general intention of the parties, as evidenced by the contract itself. *Chism v. Schipper*, 668.
3. **ARCHITECT OR ARBITRATOR, FRAUDULENT REFUSAL OF, TO GRANT CERTIFICATE.** — Though a building contract declares that the work shall be done to the satisfaction of a specified architect, to be evidenced by his certificate, that if the owner requests alterations, additions, or omissions, their reasonable value shall be added to or deducted from the contract price, and that in case a dispute arises, such architect is to decide the same, and that his decision shall be final, if certain alterations are contracted for by the owner, and made by the contractor, which the architect willfully and fraudulently decides to be within the contract and specifications, and fraudulently refuses to grant the certificate provided for by the contract, and fraudulently decides that the contractor is not entitled to payment therefor, he may maintain an action on such contract, and recover the amount to which he can show himself entitled thereunder. *Id.*
4. **ACCEPTANCE.** — PARTY IS LIABLE FOR THE PRICE OF PRINTING done under his order and subject to his "acceptance of a finished proof," where, after he has been furnished with a printed copy of his manuscript, he marks the proof "O. K.," with directions to "go ahead and print," and this, although after the whole matter is printed a material misprint is discovered therein, which was overlooked both by the printer and by himself, and made a material difference between the manuscript and the printed proof. *Giles Lithographic etc. Co. v. Chase*, 439.
5. **PENALTY OR LIQUIDATED DAMAGES.** — A stipulation in a contract for the sale of interest and good-will in an omnibus business, that the

seller will not again engage in, or use his influence in opposition to the buyer in, the same business, and that each party is "bound in the sum of three hundred dollars for the faithful fulfillment of the above contract," is a penalty, and not liquidated damages, and upon breach of the contract by the seller, the buyer may recover his actual damages sustained, which may be computed by the number of passengers carried at regular rates by the seller after violation of his contract. *Moore v. Colt*, 845.

6. **OPTIONAL CONTRACT, DAMAGES RECOVERABLE FOR BREACH OF.** — Where one party contracts to sell and deliver to another from three hundred to five hundred tons of phosphate during a certain month, and the latter agrees to give ample notice of his wants twenty-four hours ahead of the time specified for the delivery of each order, and three hundred tons are delivered under the contract, if the purchaser then notifies the seller that he will exercise his option to take the remaining two hundred tons, and requests the seller to deliver the same, but the latter refuses to do so, the buyer may recover damages in a court of law for breach of the contract. *Dambmann v. Rittler*, 364.
7. **RESCISSION OF CONTRACT.** — A REPRESENTATION MADE IN A CASUAL CONVERSATION by one partner to another, to the effect that he was worth thirty thousand dollars above his debts, is no ground for the rescission of a contract made by him some time afterwards, and not in contemplation when the conversation took place, with his partner, for a transfer to him of the partnership assets, in consideration that he would assume the partnership indebtedness, though subsequent developments showed that he was not in fact worth anything in excess of his obligations. *Arnold v. Hagerman*, 712.
8. **RESCISSION OF CONTRACT.** — PROMISES HONESTLY MADE, which the promisor is unable to fulfill, do not furnish sufficient grounds for vacating a contract based thereon. *Id.*
9. **RESCISSION.** — GRANTORS CANNOT AVOID A TRANSFER on account of a fraudulent purpose on the part of the grantee, if they had notice of the facts and circumstances from which such purpose is inferred. *Id.*
10. **RESCISSION.** — ELECTION TO RESCIND A CONTRACT ON THE GROUND OF FRAUD must be made promptly upon discovering the fraud. If any act is done by the complaining party after discovering the alleged fraud towards perfecting or carrying out the contract, it is an irrevocable election to abide by the contract. *Id.*

See ACCORD AND SATISFACTION, 1, 2; SCHOOLS, 1.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE; NUISANCES, 5.

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10. **EVIDENCE — NEWSPAPER REPORT OF DECLARATIONS OF ACCUSED.** — A newspaper reporter may testify that his report of an interview with the accused, relative to the facts of the crime as published, is an accurate statement of what occurred between him and the prisoner; and he may adopt it as his testimony, though he is not willing to affirm that it is verbally accurate, or that it contains all that the accused said. *Jackson v. State*, 542.
11. **EVIDENCE — DURESS.** — Where resolutions are passed at a public meeting, and presented to the accused before his arrest, by persons other than officers of the law, and in response thereto he writes a letter under protest, such letter is not obtained by duress, and is admissible in evidence as an admission of guilt of the crime charged. *State v. Carroll*, 883.
12. **EVIDENCE INCOMPETENT WHEN OFFERED MAY BE MADE COMPETENT** by the subsequent act of the state by its instructions changing the theory of its prosecution. *Jones v. State*, 570.
13. **ABORTION — EVIDENCE ADMISSIBLE ON TRIAL FOR PROCURING.** — On a trial upon an indictment which charges that the defendant “did knowingly use and cause to be used certain means” for the purpose of unlawfully causing the miscarriage and abortion of a certain female, a letter written by him to her, containing instructions as to how she should take a bottle of ergot which he sent with it, and proof by her that she took the drug so sent to her by him, and in other respects also followed the instructions given by him, are admissible in evidence, although he was not present when she took the drug, and did the other things which he instructed her to do; and so, also, is a conversation between him and her, in which she told him, upon his charging her with not having complied with his instructions contained in his letters, that she had done so, but without producing the desired effect. *Jones v. State*, 362.
14. **ADULTERY.** — Under a statute defining adultery to be “the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person,” it is proper to charge that, to constitute the crime, where the parties are not charged as living together, the testimony must satisfy the jury, beyond a reasonable doubt, that the criminal intercourse was habitual, — that is, frequent; and that occasional acts will not be sufficient; and it is also proper to decline to define “habitual carnal intercourse,” leaving it to the jury to say how frequent the acts must be to make them habitual. *State v. Carroll*, 883.
15. **ADULTERY.** — Where two are jointly indicted for adultery, and only one is arrested, that one may be legally tried and convicted alone. *Id.*
16. **ADULTERY — INDICTMENT.** — Under a statute defining adultery to be “the living together and carnal intercourse with each other, or habitual

carnal intercourse with each other without living together, of a man and woman," etc., the omission from the indictment of the words "without living together" does not vitiate it. *Id.*

17. **CONSPIRACY IS THE AGREEING OR CONFEDERATING** together by two or more persons to commit some crime or misdemeanor. Such confederation or agreement is itself the offense, and no overt act is necessary. *State v. Setter*, 121.
18. **FALSE PRETENSES — SUFFICIENCY OF INDICTMENT FOR.** — An indictment for false pretenses is not demurrable because it fails to set out the false pretenses intended to be relied upon; but the indictment, in other respects, must have that degree of certainty and precision that will fully inform the accused of the special character of the charge against which he is called upon to defend, that will enable the court to determine whether the facts alleged, upon the face of the indictment, are sufficient to constitute a crime, and that will protect him against further prosecution for the same alleged offense. *State v. Blizzard*, 366.
19. **INDICTMENT MUST GIVE PURPORT OF INSTRUMENT ALLEGED TO HAVE BEEN OBTAINED BY FALSE PRETENSES**, or some other proper designation thereof, so that there can be no mistake as to the identification of the instrument described with that produced in evidence in support of the indictment. *Id.*
20. **INDICTMENT FOR OBTAINING "BILL OF SALE OR MORTGAGE OF PERSONAL PROPERTY" BY FALSE PRETENSES**, where it does not aver that the instrument was assigned or transferred to the accused by the owner, or that something more passed to the accused than the mere paper upon which the instrument was written. *Id.*
21. **INDICTMENT LACKS SUFFICIENT CERTAINTY AND PRECISION** which describes the instruments alleged to have been obtained by false pretenses as certain valuable securities, to wit, the indorsement and signature to two certain promissory notes for the payment of three hundred dollars each. The offense contemplated by the statute is the obtaining by false pretenses of a subsisting security, and not merely the obtaining of a signature to an instrument. *Id.*
22. **OWNERSHIP OF PROPERTY OR SECURITIES MUST BE DISTINCTLY ALLEGED IN INDICTMENT** for obtaining them by false pretenses. Such an averment is as necessary as in an indictment for larceny. *Id.*
23. **HOMICIDE IN RESISTING ILLEGAL ARREST.** — A person may rightfully resist the attempt of another to enter his house for the purpose of illegally arresting him; and if resistance by lawful means results in the death of the assailant, it is excusable homicide; if by unlawful means, but without malice, it is manslaughter; if by unlawful means, prompted by hate and malice, and death in cool blood is intended, it is murder in the first degree. *State v. Scheele*, 106.
24. **KILLING FLEEING FELON.** — Under the common law, and section 2878 of the Mississippi code, it is lawful to kill a fleeing felon when he cannot otherwise be taken, and the necessity for such killing is for the jury to determine. *Jackson v. State*, 542.
25. **KILLING FLEEING FELON — JUSTIFICATION OF OFFICER.** — An officer who kills one for whom he has a warrant of arrest for felony must satisfy the jury that he tried in good faith, and with reasonable prudence and caution, to make the arrest, and was unable, because of the flight of the person, to secure him; that he killed him when other

means had failed, and when the arrest could not be made without resort to the means employed. *Id.*

26. **JUSTIFICATION OF OFFICER FOR KILLING FLEEING FELON.** — The jury are the judges of the necessity of killing a fleeing felon by an officer; and their verdict should be based upon the consideration of all the circumstances attending the officer and the deceased at the time; and if they entertain, from the evidence, a reasonable doubt whether the killing was necessary, they should acquit the officer. *Id.*
27. Evidence of directions given an officer when a warrant of arrest was placed in his hands is inadmissible on his trial for killing a person claimed by him to have been a felon fleeing from arrest. *Id.*
28. **MURDER — INSTRUCTION TO JURY.** — Where, upon a trial for murder, there is evidence tending to show that the accused was actuated by malice, as well as by motives of self-protection, against an apprehended assault for the purpose of an illegal arrest, the court may properly submit to the jury the whole question of motive, whether of defense or of malice. *State v. Scheele*, 106.
29. **MURDER — PROPER SUBMISSION OF CASE TO JURY.** — Upon a trial for murder in shooting and killing an officer, who had a warrant for the prisoner's arrest, and was approaching his house to execute it, the jury were instructed that "a specific, willful, deliberate intent to kill would constitute express malice aforethought," and the charge continued as follows: "If you find that the deceased was approaching the house for the purpose of breaking in to arrest the accused illegally, and the accused, under the circumstances, had reason to believe, and did believe, that the deceased was about to execute such purpose, he had a right to make all reasonable resistance; and if you find that, without saying a word to the deceased, and while he was at some distance from the house, and had made no actual assault upon it, the accused shot at and killed him, such act would not be a reasonable exercise of his right to resist, and such killing, if done with express malice, as explained, would be murder in the first degree; but otherwise, if done without express malice. It is for you to say, from all the evidence, what were the facts, and whether, under all the circumstances, what the accused did was reasonable and proper, and done without express malice; and you are to judge this man as the circumstances appeared to him at the time." In a later part of the charge, the jury were instructed, in substance, that if the killing was done on account of provocation, in a sudden heat of passion caused thereby, and not of express malice, it would reduce the crime to manslaughter; but if the killing was the result of deliberate, willful, and premeditated intent, and not the result of provocation, it would be murder. In such case, taking the whole charge together, the jury could not fail to understand that if the killing was done in defense of house, person, or liberty from the apprehended assault, and without other motive, but under such circumstances as to be an unreasonable exercise of the right of defense, the prisoner would be guilty of manslaughter only, and the case was properly submitted to the jury. *Id.*
30. **WOUND AGGRAVATED BY IMPROPER TREATMENT.** — One who inflicts upon another a wound calculated to injure or destroy life, and from which death ensues, may be convicted of manslaughter, though such wound became mortal through the improper treatment of the physician in charge, if the person wounded dies as the combined result of such wound and of such treatment. *Sharp v. State*, 27.

31. **JURY TRIAL — INVASION BY THE JUDGE OF THE PROVINCE OF THE JURY.** — Where, in a criminal prosecution for murder, a witness testified that he was present at a rencounter between the deceased and another, and that he made no effort to stop their fighting, and the court then asked the witness, "Do you mean to say that you remained there, and saw these men fighting with knives, and did not interfere in any way to prevent it?" and defendant's attorney thereupon stated that the witness had not said that he saw them fighting with knives, and the judge responded, "The jury will be the judge of that. I am examining the witness, and you can object if you do not think it proper"; and it was doubtful, from the evidence, whether the defendant had participated in the fight, — it was held that the language of the judge was prejudicial to the accused, because the jury might infer from it that the judge was of the opinion that the evidence proved that the defendant participated in the fight with knives, and thereby contributed to the killing of the deceased. *Id.*
32. **MURDER.** — An assault and battery inflicted with a designed intent, and resulting in death, is murder. A formed design to take life is not necessary to make the killing murder. *State v. Alexander*, 879.
33. **INSANITY AS A DEFENSE — BURDEN OF PROOF.** — Where insanity is made a defense, the question whether the defense is sustained or not depends upon the preponderance of evidence for or against, but the state, in such case, need not establish sanity beyond all reasonable doubt. *Id.*
34. **MURDER.** — **IRRESISTIBLE IMPULSE TO KILL** cannot be set up as a defense to murder so long as the accused knew that the act he was committing was a crime morally, and punishable by the law of his country. Such knowledge makes it imperative that he shall control himself at his peril. *Id.*
35. **MURDER — INSTRUCTIONS.** — A charge is not erroneous which states that where the killing is proven, and no more, the law will imply malice and make the act murder; but when all the facts and circumstances of the killing are in evidence, then the jury must say from the testimony what was the intention with which the act was committed. *Id.*
36. **LARCENY.** — **WHILE SECRECY IS THE USUAL EVIDENCE** of the felonious intent in larceny, still it is not the only manner in which it may be committed; for if defendant knowingly took the goods of another making no pretense of any claim or right to them, with intent to wholly deprive the owner of them, and to appropriate them to his own use, he is guilty of larceny. *State v. Powell*, 821.
37. **LARCENY — EVIDENCE OF FELONIOUS INTENT.** — Where the prosecuting witness dropped some money, which the defendant picked up, and when it was demanded said, "Oh, hell! you ain't going to get this money," and when the prosecutor started in pursuit of him in an attempt to regain possession of the money, he walked off with it, putting his hand to his breast and threatening to kill the prosecutor if he attempted to follow, — these circumstances afford strong evidence of a felonious intent in the mind of defendant, and they should be submitted to the jury to enable them to determine whether the taking constitutes larceny. *Id.*
38. **INDICTMENT FOR LARCENY** may allege the ownership of the property stolen as being in a bailee. *Id.*
39. **LARCENY IN OBTAINING GOODS BY FALSE PRETENSE.** — If the owner of goods or his employee parts with their possession without the purpose of parting with the property therein, and expects their return

or disposition according to his direction, or expects payment for them to complete a sale thereof, the taking and conversion with felonious intent to deprive the owner of the goods of his possession is larceny; or if possession is obtained by trick, artifice, or false pretence, with the felonious intent on the part of the accused to convert them to his own use, he is also guilty of larceny. *State v. Hall*, 204.

MERGE — CRIMINAL LAW. — CRIME OF CONSPIRING TO STEAL IS NOT MERGED in the crime of the actual theft committed, and may be punished as a separate offense. *State v. Setter*, 121.

RECEIVING STOLEN GOODS — EVIDENCE. — On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, evidence is competent tending to show defendant's possession of other goods alleged by the prosecutor to have been stolen from him, in order to show his guilty knowledge as to the goods laid in the indictment, although such knowledge as to the other goods is not shown. *State v. Jacob*, 897.

42. **INDICTMENT FOR A MALICIOUS ATTEMPT TO DESTROY A DAM**, which alleges that such dam is situated in a certain town, sufficiently describes its location. *Commonwealth v. Tobman*, 414.

43. **EVIDENCE. —** On the trial of an indictment for a malicious attempt to destroy a dam, where the record of a superior court shows that it acted upon what purported to be a compliance with statutory provisions in authorizing the construction of the dam, such record is admissible in evidence, and proves compliance with the statutory requirements, in the absence of evidence to the contrary. *Id.*

44. **EVIDENCE IN JUSTIFICATION. —** On the trial of an indictment for a malicious attempt to destroy a dam erected under a statute providing that, in case the river should shoal below the dam after its erection, such shoaling must be removed by the proprietors thereof within a certain time, or upon their failure so to do, it must be removed by public authority at their expense, the defendant, if he admits the attempt to destroy the dam, cannot justify his act, nor excuse the alleged malice, by evidence that he earned his livelihood by fishing, and that for many years prior to the erection of the dam he had used, and had a right to use, the river for such purpose; that on account of the erection of the dam, the river has shoaled, and has been rendered unnavigable; that such shoaling had not been removed as required; that these facts were well known to him, and that it was matter of common conversation in the neighborhood that the dam was a public nuisance which any man had a right to destroy. Defendant's only remedy in such case is to seek to enforce the provisions of the statute in regard to the removal of the shoaling in the river. *Id.*

45. **SEDUCTION — EFFECT OF MARRIAGE. —** Where seduction is accomplished under promise of marriage, and the promise has been kept, no prosecution or conviction can be had after the marriage, and the question of good faith on the part of the man in entering into such marriage cannot affect the question of his guilt or innocence. *People v. Gould*, 493.

See **ARREST; SEDUCTION**, 1, 2.

CRIMINAL PROCEDURE.

See **CRIMINAL LAW**.

CUSTOMS.

See **USAGES AND CUSTOMS**.

DAMAGES.

1. **PUNITIVE DAMAGES MAY BE RECOVERED**, though not claimed *eo nomine*, where the declaration lays damages, alleges a tort, with circumstances that may well be considered as in aggravation. *Savannah etc. R'y Co. v. Holland*, 158.
 2. **DAMAGES FOR THE DEATH OF A HUMAN BEING** may, under the statute of Missouri, be such as the jury deems "just, with reference to the necessary injury resulting from such death," not exceeding five thousand dollars. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
 3. **EVIDENCE OF THE NUMBER AND AGES OF THE PLAINTIFF'S MINOR CHILDREN IS ADMISSIBLE** in an action by a widow to recover for the death of her husband, where she is, as in Missouri, at least during her widowhood, bound to support such children. *Id.*
- See** APPEAL AND ERROR, 4; ATTACHMENT AND GARNISHMENT, 7-10; CARRIERS; CONTRACTS, 5, 6; EVIDENCE, 5; NEGLIGENCE; NUISANCES; OFFICIAL BONDS, 2, 3; PARENT AND CHILD, 11, 12.

DECEIT.

See FRAUD.

DEDICATION.

1. **TO CONSTITUTE A HIGHWAY OR STREET BY DEDICATION**, which the public authorities are bound to repair, there must be an acceptance of it as such by such authorities, and this may be proved either by formal acceptance, by repairing, or probably by the use of it by the public for many years with the knowledge and assent of such authorities. *Board of Supervisors v. Seal*, 545.
2. **WHILE ACCEPTANCE BY FORMAL ADOPTION** by public authorities or by public user is necessary to impose on the public the duty to keep [in repair a dedicated highway or street, still that is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction, or to subject the dedication to the public use, whenever, in the estimation of such authorities, the wants or convenience of the public require it for the purpose for which it was originally given. *Id.*

DEEDS.

1. **FRAUD AND MISTAKE — EVIDENCE TO REFORM DEEDS, WHAT REQUISITE.** — In order to correct a deed, whether on the ground of mutual mistake of one of the parties, and fraud on the part of the other, or that it was drawn by mistake as an absolute deed, when it was intended to be a mortgage or trust deed, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a lost deed, such allegations of the party seeking relief as are necessary to show his right to it must be established by clear and convincing proof, and evidence *dehors* the deed, and inconsistent with it, must be shown in order to set up a parol trust, or to reform the deed. *Harding v. Long*, 775.
2. **FRAUD AND UNDUE INFLUENCE — EVIDENCE TO PROVE.** — In order to have a deed declared void because executed through false and fraudulent representations or undue influence, or because executed with intent to hinder and delay creditors, the allegations material to establish the fraud must be proved so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, but their truth need not

be established, to the satisfaction of the jury, "beyond all reasonable question." *Id.*

See WILLS, 10, 11.

DESCENT AND DISTRIBUTION

See CONFLICT OF LAWS, 2; INSURANCE, 3; LANDLORD AND TENANT 2; PARENT AND CHILD, 2; WILLS, 15.

DEVISES.

See WILLS.

DOWER.

See PARTITION, 5.

DURESS

See CRIMINAL LAW, 11.

EASEMENTS.

1. RIGHT OF WAY is an interest in lands, and a grant of such a right by parol is obnoxious to the statute of frauds. *Bonelli Brothers v. Blakemore*, 550.
2. RIGHT OF WAY BY PRESCRIPTION can only be claimed after the right has been exercised for an uninterrupted period of ten years. *Id.*
3. RIGHT OF WAY — "APPURTENANCES." — A vendee of a portion of a parcel of land owned by his vendor cannot obtain a right of way in the remaining land of the vendor, from the use of the word "appurtenances" in the grant. *Id.*
4. APPURTENANT EASEMENTS. — RIGHT WHICH OWNER EXERCISES IN PASSING ACROSS ONE part of his land in using another part is not an easement appurtenant to the land, as no man can have an easement in his own property. *Id.*
5. RIGHT TO PASS OVER THE PROPERTY OF ANOTHER is an easement which passes by grant of the property and its appurtenances. *Id.*
6. WAY BY NECESSITY. — Where land is conveyed surrounded by other lands of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied as an incident to the grant; or where land is conveyed by designation merely, and not by metes and bounds, such other land not covered by the buildings or curtilage, as by its use has become essential to its use or enjoyment, passes by the grant, not strictly as implied therein, but included as part of the thing expressly granted. *Id.*
7. EASEMENT NOT OF STRICT NECESSITY does not pass by implied grant, unless apparently permanent, obvious, and continuous. *Id.*
8. CONTINUOUS EASEMENT IS ONE WHICH MAY BE USED and enjoyed without the intervention of the act of man, as a spout discharging rain-water. *Id.*
9. NON-CONTINUOUS EASEMENT IS ONE to the enjoyment of which the act of the party is essential. Of this class, a way is the most familiar. *Id.*
10. EASEMENT NOT OF STRICT NECESSITY will not pass by implied grant, unless it is apparent and continuous. *Id.*

EJECTMENT.

1. ADVERSE POSSESSION. — JUDGMENT IN EJECTMENT, not followed by any writ, nor by taking possession under it, does not suspend nor interrupt

the running of the statute of limitations. Nor will the effect of the judgment be changed in this respect by the fact that an appeal was taken therefrom to the supreme court, where it was voluntarily dismissed by the defendants. If, however, the defendants, by parol or otherwise, consented to abide the judgment for possession, the effect is the same as if they had been turned out by a writ issued upon it, and had thereupon become tenants of the plaintiff. *Mabary v. Dollarhide*, 639.

2. EVIDENCE. — WHERE DEFENDANT IN EJECTMENT CLAIMS UNDER THE WILL of a living person providing that he shall have immediate possession of the land in dispute on condition that he takes the testatrix and cares for her as one of his own family during her natural life, evidence is admissible to show that he took and still retains possession under the will, that the testatrix lived with him for a long time, and that he has performed his part of the contract as indicated by the will. *Smith v. Twit*, 851.

ELECTIONS.

1. CONTEST BY WOMEN. — The enactment of a statute making women eligible to school offices repeals, by implication, so much of a former statute in force as requires the statement by a contestant that he is an elector. Women may therefore contest their right to an office to which they are eligible. *Brown v. McCollum*, 228.
2. CONTEST — GROUNDS OF. — Section 697, Code of Iowa, providing that the contestant of an election must file his grounds of contest within twenty days after the canvass of the votes, does not prevent the contestant from afterwards amending such grounds of contest. *Id.*
3. CONTEST — DISPUTED BALLOTS — INTENTION OF VOTER MUST GOVERN. — In ascertaining for whom disputed ballots were cast, the intention of the voter, as ascertained from the ballot itself, or from the ballot examined, and considered in the light of all the facts and circumstances developed at the trial, must be respected, and the ballot counted for whom the voter intended it; but if his intention is not apparent, or cannot be reasonably or fairly ascertained, then the ballot must be rejected. *Id.*
4. CONTEST. — IN ASCERTAINING FOR WHOM A DISPUTED BALLOT WAS CAST, its language and form should be considered and construed in the light of all facts connected with the election, as the office to be filled, the names of the candidates voted for, and all other facts of which the voter may be presumed to have been advised, and in view of which he may have exercised his franchise; and if the intention of the voter is thus made apparent beyond a reasonable doubt, the ballot is sufficient, without regard to technical inaccuracies in its form. *Id.*
5. CONTEST. — IN ASCERTAINING FOR WHOM A DISPUTED BALLOT WAS cast, if the voter's intention is found, such intention should not be defeated by the fact that the name of the candidate is misspelled, the wrong initials employed, or some other or slightly different name of like or similar pronunciation has been written instead of that of the candidate actually intended to be voted for. *Id.*
6. CONTEST. — WHERE THE NAMES OF BOTH CONTESTANTS are found on a disputed ballot, one name printed and the other written, but neither erased or crossed off, the writing is presumed to express the intention of the voter, and will prevail over the printing, and such ballot must be counted for the person designated by the writing, and the printed name

will be considered as erased. If, however, the voter has erased the written name, leaving the printed name unerased, the ballot must be counted as printed, and the name will be considered as erased if a line is drawn through it, though it is not wholly obliterated. *Id.*

7. **CONTEST — NAME WRITTEN ABOVE OR BELOW ITS PROPER PLACE.** — In ascertaining for whom disputed ballots were cast, if one is cast for either of the parties to the contest for any other office than that for which he was nominated, it cannot be counted; but the mere fact that in writing his name on the ballot the voter has placed it slightly above or below its proper place on the ticket will not justify its rejection if it is apparent from the face of the ballot that the voter intended to cast it for the office in controversy. *Id.*
8. **CONTEST.** — If a disputed ballot contains the name of either contestant, but does not fairly state or indicate the office such party is voted for, it must be rejected. *Id.*
9. **THE COURT CANNOT, AS MATTER OF LAW,** direct a finding as to any of the disputed ballots in a case of contested election. That question should be left to the jury, under proper instructions. *Id.*

See EVIDENCE, 6.

EQUITABLE CONVERSION.

See EXECUTIONS, 2, 3; WILLS, 29.

EQUITABLE MORTGAGE.

See MORTGAGES, 5.

EQUITY.

OWNER OF REALTY IS ENTITLED TO EQUITABLE AID TO PREVENT PERMANENT AND CONTINUALLY RECURRING INJURIES to the enjoyment of his property. He is entitled to such relief as will protect him in his interests, and wrong-doers cannot rely upon their own wrongs to change or lessen his means of redress. *Koopman v. Blodgett*, 527.

see MORTGAGES, 2.

ESTATES OF DECEDENTS.

1. **JURISDICTION.** — Equity has concurrent jurisdiction with courts of ordinary for the purpose of distributing estates; and where the court of ordinary would have had jurisdiction to pass an order for the sale of a portion of the property to pay off an indebtedness against an estate, a court of equity has the same power. *McGowan v. Lufburrow*, 178.
2. **INFANTS BOUND BY DECREE.** — Where, upon application before a chancellor to sell the contingent remainders of minor heirs to pay debts due by the estate, such minors are represented by their next friend, who joined in the petition of sale, the chancellor has jurisdiction of their persons and property; they are his wards in chancery, and bound by his decree. *Id.*
3. **FAILURE TO FILE PETITION** to sell real estate to pay debts against an estate, in which all of the parties interested join, more than thirty days before the term commenced, as required by statute, is at most a mere irregularity, which does not avoid the decree, when, in fact, an *ex parte* petition need not be filed any number of days before court convenes. *Id.*

4. **STATUTE OF LIMITATIONS.** — Section 123, Code of South Carolina, providing that action may be brought on a claim against a deceased person within one year after administration is granted, applies only to those cases where no administration is taken out until after the expiration of the statutory period, the statute having commenced to run in the lifetime of the decedent. *Strain v. Babb*, 905.

ESTATES FOR LIFE.

See REMAINDERMEN AND REVERSIONERS.

ESTOPPEL.

See CONTRACTS, 4; CORPORATIONS, 4; HIGHWAYS, 1; PARTITION, 4.

EVIDENCE.

1. **THE ONUS PROBANDI** is on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant. *City of Fort Smith v. Dodson*, 62.
2. **ALMANAC — JUDICIAL NOTICE.** — Counsel may refer to an almanac, in his argument to the jury, to show that a witness has testified falsely as to a certain day of a certain week or month, although the almanac is not proved and put in evidence. The court will take judicial notice of the coincidence of the days of the week with the days of the month. *Wilson v. Van Leer*, 854.
3. **JUDICIAL NOTICE.** — Matters of which judicial notice is taken, as the dates in an almanac, need not be put in evidence. *Id.*
4. **TAXATION — PAROL EVIDENCE TO APPLY ASSESSMENT TO ITS SUBJECT-MATTER.** — Where, in an action for trespass on land, it is sought to prove that the land was assessed to the plaintiff, who claimed title by adverse possession, and the assessment list did not describe the property so particularly as to make it certain that it embraced the land in controversy, it may be shown by the testimony of the assessor who made the assessment, upon an actual view of the land, that it had been assessed to the plaintiff. *Wren v. Parker*, 127.
5. **EVIDENCE OF TITLE.** — In an action against a railroad company for damages for the value of hay destroyed by fire set by the company's engine, plaintiff may prove his title to the hay by evidence that it was cut on land leased by him of an agent of the owner, the agent testifying that he had controlled and paid the taxes on the land for fifteen years, as agent for the owner; that he has leased it for the latter, and sold the hay on it to the plaintiff. *Metzgar v. Chicago etc. R'y Co.*, 224.
6. **IN AN ACTION** under a statute conferring jurisdiction upon certain courts to enjoin or abate as a nuisance any building or place resorted to for the purposes of prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquors, upon the petition of ten of the legal voters of any town or city, it may be shown that the name "A. M. Allen" appearing upon such petition was signed by Augustine M. Allen, a legal voter of a certain city. *Carleton v. Rugg*, 446.
7. **INTENTIONS OF ALLEGED LUNATIC WHEN HIS SANITY WAS UNQUESTIONABLE** are competent evidence for the consideration of the jury, in a case wherein his will or deed is sought to be avoided on account of his want of capacity to execute it. *Rice v. Rice*, 831.

8. **DECLARATIONS — EVIDENCE OF INSANITY.** — Declarations made by a grantor not more than fifteen months before a finding of insanity against him, nor more than eighteen months before the execution of the disputed deed, that he intended to execute "this conveyance" or "a deed" to defendants, are not so remote as to be inadmissible in their favor when they are sued in ejectment; nor does it affect the admissibility of such declarations that there is a variance between them and what the grantor subsequently did. *Id.*
 9. **PHOTOGRAPHIC SKETCHES OF THE SCENE OF AN ACCIDENT ARE ADMISSIBLE IN EVIDENCE** as a correct representation of the locality and its surroundings, and any change in the appearance of the locality, arising from the views being taken at a different season of the year, is open to explanation. *Dyson v. New York etc. R. R. Co.*, 82.
 10. **EVIDENCE THAT THE PLACE WHERE AN ACCIDENT OCCURRED HAS SINCE BEEN REPAIRED IS ADMISSIBLE**, on the redirect examination of a witness, when the defendant has, on cross-examination, shown that no other accident has occurred there before nor since the one in question. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
 11. **EVIDENCE OF THE CONDITION OF A RAILWAY TRACK NEXT TO THAT WHERE AN INJURY TOOK PLACE** is admissible as part of the description of the surroundings, as part of the *res gesta*, if the defense is negligence on the part of the injured person in handling his team and wagon, and in other respects. *Id.*
 12. **RES GESTÆ.** — In an action against a railway company for the killing of the decedent, a physician was permitted to testify to the contents of a telegram received by him from the plaintiff (who subsequently sued as administrator of the decedent), that the witness drove some twelve or thirteen miles to see the deceased, and to what the deceased then told him regarding the injuries which he had received, and the means by which they had been occasioned. It was held that the admission of this testimony was error, that the contents of the telegram were hearsay, and the statements made to the physician were not part of the *res gesta*. *Fordyce v. McCanta*, 69.
 13. **DECLARATIONS — RES GESTÆ.** — In an action against a railway company to recover damages for personal injury, declarations made by plaintiff half an hour after the accident, as to the manner of his leaving the train and receiving the injury, are inadmissible as part of the *res gesta*. *Savannah etc. R'y Co. v. Holland*, 158.
 14. **PRESUMPTION IS THAT PARTIES** to a suit are free from complicity in unlawful or improper conduct in obtaining evidence or otherwise, but when any question arises as to improper means employed to get up evidence, it should be left to the jury under all the facts and circumstances of the case. *Id.*
- See **ADVERSE POSSESSION**; **AGENCY**, 4; **CORPORATIONS**, 3; **DAMAGES**, 3; **DEEDS**; 1, 2; **ESTATES OF DECEDENTS**, 1; **LANDLORD AND TENANT**, 5; **LIBEL AND SLANDER**; **NEGOTIABLE INSTRUMENTS**, 9; **WITNESSES**.

EXECUTIONS.

1. **EVERY INTEREST OF A DEBTOR IN LAND**, whether legal or equitable, is bound by the lien of a judgment rendered in the same county, and is consequently subject to sale under execution issued upon such judgment. *Eneberg v. Carter*, 664.

2. **LANDS WHICH BY THE OPERATION OF A WILL ARE CONVERTED INTO PERSONALTY**, without any action upon the part of the executor, are not subject to execution as real estate, and are therefore not affected by the lien of a judgment against a devisee who will become entitled to the proceeds of such lands when they shall have been sold by the executor, as directed by the will. *Id.*
3. **INTEREST OF DEVISEE IN LANDS, WHEN SUBJECT TO.** — If a testator expresses in his will a desire to have his estate divided equally between his children, and that his executor will dispose of his real estate as soon as it can be done without loss, such real estate is not thereby converted into personalty, and the interest of one of such children therein is subject to sale under execution, and to the lien of a judgment rendered against him. *Id.*

See EXEMPTIONS; FACTORS.

EXECUTORS AND ADMINISTRATORS.

1. **PURCHASE OF LAND BY AN ADMINISTRATOR UNDER A JUDGMENT IN HIS FAVOR AS SUCH ADMINISTRATOR** vests him with title to the property purchased as an individual, to be by him held in trust for the heirs and creditors of the estate. *Mabary v. Dollarhide*, 639.
2. **POWER OF EXECUTOR TO CONTRACT DEBTS.** — Direction in a will to keep the estate together, and to manage, control, and keep up the farming interests therein, confers a limited power on the executor to create such debts as would ordinarily be incurred by a prudent farmer in conducting farming operations, and such power may be exercised by an administrator with the will annexed, it not being such a power as manifestly arises from personal trust. *Palmer v. Moore*, 147.
3. **ADMINISTRATOR, HEIRS AS SURETIES OF.** — If HEIRS OR DISTRIBUTEES ARE ALSO SURETIES ON THE BOND OF EXECUTORS OR ADMINISTRATORS, and they bring an action against other sureties of the same executors or administrators, though upon a different bond, the latter have an equitable defense to the extent of the amount which they could claim by way of contribution against the plaintiffs as their co-sureties. *Dugger v. Wright*, 48.

EXEMPTIONS.

INSURANCE MONEY DUE ON THE LOSS OF A HOUSE which was part of the homestead of the insured is not exempt from levy under execution or attachment. *Smith v. Ratcliff*, 606.

See ATTACHMENT AND GARNISHMENT, 6; REPLEVIN, 1.

EXPRESS COMPANIES.

CONTRACT LIMITING LIABILITY. — A receipt issued by an express company for an article when received for transportation containing a condition that the company will not "be liable for any loss or damage, unless the claim therefor shall be presented in writing at this office within thirty days after this date," will not limit the liability of the company for damages in neglecting and delaying to forward an article received for transportation by the office issuing the receipt. *Baltimore etc Express Co. v. Cooper*, 586.

FACTORS.

FACTOR'S GOODS, CONSIGNED TO A FACTOR FOR SALE, remain the property of the consignor, and are not subject to the debts of the factor; and no ingenious contract is required to protect them from his creditors. *Peet v. Heim*, 865.

FALSE PRETENSES.

See **CRIMINAL LAW**, 18-22, 39.

FIXTURES.

See **LANDLORD AND TENANT**, 3.

FRAUD.

1. **MERE SUSPICION IS NOT NOTICE OF FRAUD**; hence suspicion by a purchaser that the seller intends to defraud his creditors by a sale is not sufficient to put such purchaser on inquiry, or to vitiate a purchase made by him. *Tuteur v. Chase*, 577.
2. **FRAUD CANNOT BE FOUNDED ON MERE SUSPICION**. It will not be presumed, but must be proved. Hence the mere suspicion of the jury that it was the intent of a seller to defraud creditors in making a sale will not warrant them in finding that the purchaser did not act in good faith. *Id.*
3. **FRAUDULENT REPRESENTATIONS—RIGHT OF ACTION**.—Where plaintiff, who was defendant's confidential adviser, and engaged in the ice business, of which defendant was ignorant, advised the latter to invest in a new business of the same nature, enjoining secrecy in the matter, and representing that property purchased for the purpose cost twenty thousand dollars, when in fact it cost but fourteen thousand dollars; and defendant, relying upon the statement as true, invested to the extent of a one-third interest in a corporation formed for the purpose, paying therefor more than the other two thirds cost plaintiff and another incorporator, such representation is actionable, being one of fact, and not a mere expression of opinion as to value; and as the representation was made before the corporation was formed, the defendant, and not the corporation, was the party injured thereby, and defendant may maintain a counterclaim to recover the damages resulting from such representations, notwithstanding the fact that he had sold his stock, and parted with all interest in the corporation. *Teachout v. Van Hoesen*, 206.
4. **REPRESENTATION, IN ORDER TO FORM THE GROUND OF AN ACTION OF DECEIT**, where one has been induced to act by reason thereof, must be one of some existing fact. A statement, promissory in its character, that one has purchased and will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any future event, is not properly a representation, but a contract, for a violation of which the remedy is by action thereon. *Dawes v. Morris*, 404.
5. **INJURY FROM FALSE REPRESENTATION**, in order to sustain an action of deceit, must be direct and material, and the probability or possibility that, because defendant had purchased at a certain price, the plaintiff would be able, or might believe himself to be able, from defendant's representation, to do so also, is too remote to support the action. *Id.*

- 6. FALSE REPRESENTATIONS.** — To sustain an action of deceit for false representations, it must be shown, not only that defendant has committed a tort, and that plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained. *Id.*
- 7. PLEADING.** — DECLARATION IN TORT FOR DECEIT does not state a good ground of action, which alleges that defendant, in order to induce plaintiff to enter into a contract to build a section of railroad, falsely represented that he had purchased certain rails at a price specified, and would sell them to plaintiff at the same price if he would make the contract; that, relying upon such representations as true, plaintiff made the contract; that defendant had not then purchased the rails, and did not sell, nor intend to sell, any rails so purchased to plaintiff, who, being thus induced to enter into the contract, was obliged to purchase a large number of rails at a much higher price than that named by defendant, to his great injury and damage. *Id.*
- See ARBITRATION AND AWARD, 1, 3; BANKRUPTCY AND INSOLVENCY; BANKS AND BANKING, 3, 5; CONTRACTS, 3, 7, 10; CORPORATIONS, 6-9; DEEDS, 1, 2; LIMITATION OF ACTIONS, 7, 8; SALES, 4.

FRAUDULENT CONVEYANCES.

- 1. TO DEFEAT ALIMONY.** — A claim for alimony is not a debt, within the meaning of that term as used ordinarily, and must be ascertained and allowed according to equitable principles; still it is a right, contingent to some extent, which becomes vested with the right to a divorce, and cannot be defeated by a fraudulent conveyance by the husband any more than it could were it a sum fixed and certain in amount. *Picket v. Garrison*, 220.
- 2. TO DEFEAT ALIMONY.** — In an action to set aside an alleged fraudulent conveyance by a husband, executed to defeat his wife's claim for alimony, it is competent to prove that before divorce proceedings were commenced, and the day before the conveyance was made, the husband, without the wife being present, consulted with his attorney in regard to the property in dispute. Such evidence is admissible to show the wrongful intent of the husband, and tends to explain his subsequent acts. *Id.*
- 3. TO DEFEAT A WIFE'S CLAIM FOR ALIMONY** is shown by evidence that after an attempted settlement between husband and wife had failed, and the day before divorce proceedings were commenced by her, he arranged with the purchaser and a banker to meet at the bank at six o'clock the next morning, at which time a bill of sale of the disputed property was executed, and the purchase price, excepting five dollars previously paid, was advanced by the banker, and possession of the property immediately taken; that such conveyance included substantially all the property owned by the husband, and that the purchaser knew of the wife's presence and feared her interference with the property, and that on the day of the transfer there was a struggle on the part of the wife to have her writ of attachment against the property issued and levied before the husband could dispose of it. *Id.*
- 4. TO DEFEAT ALIMONY.** — A purchaser's title to property worth two thousand dollars, shown to have been conveyed to him to defeat a wife's anticipated claim for alimony, cannot be sustained by proof that the purchaser paid five dollars on account prior to the commencement of the divorce proceedings, and that he had no knowledge, as far as

- the record shows, of any trouble between husband and wife, nor any reason to anticipate divorce proceedings between them. *Id.*
6. **VOLUNTARY CONVEYANCE, WHEN VOID AS TO SUBSEQUENT CREDITORS.** — A voluntary conveyance or settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the minds of the parties, at the time of the execution of the conveyance, to thereby hinder, delay, or defraud the creditors of the grantor. *Hagerman v. Buchanan*, 732.
 6. **VOLUNTARY CONVEYANCE, BURDEN OF PROOF.** — A subsequent creditor who seeks to attack and avoid a voluntary conveyance made by his debtor must assume the burden of proving an actual fraudulent intent on the part of the grantor to defraud some creditor. *Id.*
 7. **VOLUNTARY CONVEYANCE, FRAUDULENT INTENT FROM WHAT PRESUMED.** — In an attack upon a voluntary conveyance by a subsequent creditor, the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent. *Id.*
 8. **VOLUNTARY CONVEYANCE, PRESUMPTION FROM GRANTOR'S EMBARKING IN HAZARDOUS BUSINESS.** — The fact that the grantor enters into a hazardous business or engages in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent. This intent will not be inferred, however, if it appears that the grantor earnestly examined and sought to inform himself regarding the business into which he entered, and was led to believe that it was entirely safe. *Id.*
 9. **CONDITIONAL SALE VOID AS TO CREDITORS.** — A written consignment affixed to an invoice, and accepted in writing by the consignee, stating that the piano consigned is the property of the consignor, and is so to remain until fully paid for, that it is shipped and delivered to the consignee upon the express condition that he shall remit the price asked, or return the piano, at his own expense, at the expiration of the time stated, is a conditional sale, with an agreement that the title is to remain in the consignor until the price is paid; and although it is good as between the consignor and consignee, it is void as to the latter's creditors. *Peck v. Heim*, 865.
 10. **AN AGREEMENT MADE FOR THE PURPOSE OF COVERING UP A SALE** and preserving a lien in the sellers for the price of the goods is void as respects creditors of the buyer, whether credit was given before or after the delivery of the goods. A consignment made for such purpose is no better than any other device. *Id.*
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; PARTNERSHIP, 9-11.

FRAUDULENT REPRESENTATIONS.

See FRAUD.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GIFTS.

DONATIO CAUSA MORTIS. — Where one whose wife was in an insane hospital, and who had quarreled with his daughters, two days before his death said to defendant, with whom he boarded, "I did hope to live to

see the end of my wife"; when defendant replied, "What shall I do if anything happens to you?" and the deceased said, "Go for Cole, the undertaker; have me buried with the money from the Mechanic Association; and do as you please with what I have," but there was no delivery of any articles, the transaction did not constitute a *donatio causa mortis*, as both words of present gift and delivery are wanting. *Fearing v. Jones*, 392.

HABEAS CORPUS.

THE RETURN OF A WRIT OF HABEAS CORPUS MADE UNDER OATH WILL BE TAKEN AS TRUE unless denied by the party against whom it is made. If a petitioner sees fit to bring on the hearing on the averments in the petition and the return, he must be considered as conceding the truth of all material facts stated in the sworn return. *Richards v. Collins*, 726.

HANDWRITING.

See WITNESSES, 1, 2.

HARMLESS ERROR.

See APPEAL AND ERROR; NEW TRIAL, 3; TRESPASS.

HIGHWAYS.

1. **EXTINGUISHMENT OF RIGHT TO BY NON-USER AND ADVERSE POSSESSION.**—The entire non-user by the public, for a period of ten years, of a highway, and the actual, open, notorious, and adverse possession thereof by a party for the same length of time, will estop the public from thereafter claiming any right therein against such party or those claiming under him. *Orr v. O'Brien*, 277.
2. **TOWNSHIP OFFICERS ARE ONLY BOUND TO ANTICIPATE** and provide against the ordinary needs of travel conducted in the ordinary manner on ordinary country roads, and to remove obstructions and defects which would naturally or probably cause injury to the traveler along such highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate unusual dangers or obstructions to which a broken wagon or a frightened horse may expose the driver. *Township of Jackson v. Wagner*, 833.
3. **LIABILITY OF TOWNSHIP FOR AN ACCIDENT HAPPENING ON A HIGHWAY DOES NOT EXIST** if the road was at that time and place in a condition which made it suitable and sufficient for public travel conducted in the ordinary manner. It is not sufficient for the plaintiff to show that injuries resulted to him from the combined effect of the condition of the road and of a succession of accidents which there befell him. *Id.*

See DEDICATION, 1, 2; EASEMENTS.

HOLIDAYS.

A SUMMONS ISSUED, TESTED, AND SERVED UPON A LEGAL HOLIDAY will not be quashed, nor will its service be vacated, when the statute creating such holiday merely declares that certain days shall be legal holidays, "and no court shall be held upon said days, except in the cases where said court would now sit upon a Sunday; and no person shall be compelled to labor upon any of said days by any person or corporation." *Glenn v. Eddy*, 664.

HOMESTEAD.

1. **HOMESTEAD UNDER LAW OF THE UNITED STATES, CONVEYANCE OR.** — An agreement to convey or a conveyance by a homesteader, executed before his entry is completed, is against public policy and void, and the courts will so declare it, notwithstanding the homesteader is the plaintiff, and as such is seeking to avoid his own contract or deed. *Nichols v. Council*, 20.
2. **RIGHT OF SOLDIER TO ADDITIONAL HOMESTEAD UNDER THE STATUTES OF THE UNITED STATES IS INALIENABLE** before such right is perfected, and if a power of attorney is given by a soldier to convey lands of which he may be or become seised, including any which may be located under the soldiers' additional homestead act of June 8, 1872, and if thereafter an entry is made in his name, followed by a conveyance by his attorney in fact, acting under such power of attorney, and afterwards final proof is made and a patent issued, such conveyance is void. *Id.*

See EXEMPTIONS.

HOMICIDE.

See CRIMINAL LAW, 23-35.

HUSBAND AND WIFE.

HUSBAND HAS NO RIGHT TO WITHHOLD FROM HIS WIFE SUCH MEDICAL ASSISTANCE as her case may require. *State v. Housekeeper*, 340.

See FRAUDULENT CONVEYANCES, 1-4; PARTITION, 5; PHYSICIANS AND SURGEONS, 2.

ICE.

See WATERCOURSES, 1.

IMPROVEMENTS.

See CO-TENANCY, 3; NOTICE, 6; REMAINDERMEN AND REVERSIONERS, 5.

INDICTMENT.

See CRIMINAL LAW.

INFANTS AND INFANCY.

See ESTATES OF DECEDENTS, 2; MASTER AND SERVANT, 12, 13; NEGLIGENCE, 11, 15; PARENT AND CHILD; PARTITION, 1.

INJUNCTIONS.

1. **RESTRAINING SUIT IN ANOTHER STATE.** — Courts of one state will not restrain the prosecution of a suit pending in a sister state, which has jurisdiction of the subject-matter and of the parties, upon the ground that the decision of that court may differ from the decision of the court in the other state, or from the decisions of other courts of equal authority. *Carson v. Dunham*, 397.
2. **DISCRETION OF COURT.** — In an action commenced under a statute conferring jurisdiction upon certain courts to enjoin or abate as a nuisance any building resorted to or used for certain illegal purposes, upon the petition of ten of the legal voters of any town or city, if the

respondents admit the facts stated in the petition to be true, the presiding judge may, in his discretion, order a preliminary injunction to issue. *Carlton v. Rugg*, 446.

See EQUITY; EVIDENCE, 6.

INSANITY.

See CRIMINAL LAW, §3; EVIDENCE, 7, 8.

INSTRUCTIONS.

See APPEAL AND ERROR; CRIMINAL LAW; TRIAL.

INSURANCE.

1. **MISREPRESENTATIONS OF AGENT BINDING UPON COMPANY.** — Where an insurance agent fills out and signs an application for insurance without the authority or knowledge of the applicant, in which he states that the property is unencumbered, although the applicant, in a prior oral application to him for insurance, told him that there was a mortgage on the property, the company is bound, though the policy provided that it should be void for any false representation made in the application. In such case the company, by issuing the policy and accepting the premium, must be held to have waived a written application by the assured, and to have taken the insurance with the encumbrance on the property. *Baker v. Ohio Farmers' Ins. Co.*, 485.
2. **CANCELLATION OF ONE POLICY AND DELIVERY OF ANOTHER.** — Where an insurance agent with general authority from the owner to keep his property insured cancels one policy on order of the company issuing it, and immediately reinsures in another company, paying the premium, notifying the assured by mail of the transaction, and depositing the policy in his safe for the assured, this is a sufficient cancellation of the first and delivery of the second policy to bind the latter company in case of loss. *Dibble v. Northern Assurance Company*, 470.
3. **WHO ENTITLED TO PAYMENT OF.** — Though a policy of life insurance may provide that it is payable to the devisees of deceased, as designated in his last will and testament, still, if the insured dies intestate, the avails of his life insurance will descend to his wife and heirs or their assignee, the same as any other property or chose in action. *Newman v. Covenant Mut. Ins. Co.*, 196.
4. **WAIVER OF CONDITIONS.** — Where a policy of life insurance provides that it shall be void if the insured shall use alcoholic drinks so as to injure his health, and that the insurer may cancel the policy when it comes to his knowledge that the insured has made false statements in this respect, or does so use alcoholic liquor, and that the policy shall be void if he dies from the effects of intoxication or while intoxicated, and the insurer's agent makes out a policy, well knowing the insured to be an habitual drunkard, and afterwards receives the premium without canceling the policy, the insurer thereby waives all the conditions in the policy, except that making it void if the insured dies while intoxicated, or from the effects of intoxication. *Id.*
5. **JUDGMENT FOR THE AMOUNT OF THE POLICY,** with interest thereon from the time that the policy should have been paid, is proper, where a foreign life insurance company refuses to obey an order of court and pay a loss which occurred six years before. The officers of the cor-

peration in another state cannot, in such case, be punished for contempt for disobeying the order of the court. *Id.*

6. **MUTUAL BENEFIT ASSOCIATIONS. — BY-LAWS, ARTICLES OF ASSOCIATION.** and certificates of membership of mutual benefit associations determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided. *Union Mutual Ass'n v. Montgomery*, 519.
7. **MUTUAL BENEFIT ASSOCIATION — REASONABLE BY-LAW. —** A by-law of a mutual benefit association providing that "any member may change the beneficiary designated upon application in writing, stating to whom he desires such benefits paid, the surrender of his old certificate, and the payment of a fee of one dollar," is a reasonable regulation of the right of the member to exercise the power of appointment of the beneficiary whenever and so often as he pleases. *Id.*
8. **MUTUAL BENEFIT ASSOCIATION. — DESIGNATED BENEFICIARY** of a member of a mutual benefit association has no interest nor vested right in the fund or bounty of his donor until the death of the latter. Therefore the consent of the former to a change made in the beneficiary is not required. *Id.*
9. **MUTUAL BENEFIT ASSOCIATIONS. —** Designated beneficiary of a member of a mutual benefit association has, upon the death of such member, an interest fixed and certain in the bounty of his donor, and he may compel the corporation to levy an assessment for its payment. *Id.*
10. **MUTUAL BENEFIT ASSOCIATIONS — CONSTRUCTION OF DISPOSING CLAUSE. —** Where a member of a mutual benefit association designates that his benefits shall be paid to his son and daughter, "if living," and "if not living," to his heirs, or if either be dead, then to the survivor, the words "if living" and "if not living" refer to living at the time of the donor's death, and the provision as to survivorship applies to the beneficiary surviving him. *Id.*
11. **MUTUAL BENEFIT ASSOCIATIONS — CONSTRUCTION OF DISPOSITION. —** Disposition of benefits created by a mutual benefit association should be construed the same as a bequest by will. *Id.*
12. **MUTUAL BENEFIT ASSOCIATIONS. — DISPOSITION OF BENEFITS** made by a member of a mutual benefit association operates and vests in the beneficiary from the death of the member, unless an intention to the contrary appears. *Id.*

INTEREST.

See USURY; WILLS, 28.

INTERMIXTURE OF GOODS.

See ATTACHMENT AND GARNISHMENT, 4; TRUSTS AND TRUSTEES, 1.

JAILS AND PRISONS.

See MUNICIPAL CORPORATIONS, 10-13.

JUDGMENTS.

1. **CLERK AS CUSTODIAN OF RECORDS OF JUDGMENTS HAS NO AUTHORITY TO TAMPER WITH THEM** by adding a letter to the name of a judgment debtor in the index, and if he does so, the alteration is to be disregarded, and the record is to be regarded as it stood before it was tampered with. *Aetna Life Ins. Co. v. Hesser*, 297.

2. **ENTRY IN INDEX IS NECESSARY TO MAKE JUDGMENT OR TRANSCRIPT A LIEN.** — A judgment or transcript, before it becomes a lien, must be of record in the books required by statute, and the record is not completed until an entry is made in the index. *Id.*
3. **JUDGMENT IS NOT REGARDED AS RENDERED UNTIL IT HAS BEEN INDEXED,** nor is the filing of a transcript of a judgment completed so as to make the judgment a lien until it is indexed. *Id.*
4. **JUDGMENT NOT ENTERED IN "INDEX OF ALL LIENS" IS NOT A LIEN** superior to that of the mortgage of a subsequent mortgagee without actual notice. *Id.*
5. **COLLATERAL ATTACK ON JUDGMENT.** — PRESUMPTION is, that upon application to a chancellor in a matter over which he has jurisdiction, he will make a proper investigation as to the truth of the allegations contained therein; and unless the record shows the contrary, his judgment is valid, and not subject to collateral attack. *McGowan v. Lufburrow*, 178.
6. **EVERY DOUBT SHOULD BE RESOLVED IN FAVOR** of the validity of a judgment, where the rights of *bona fide* purchasers are involved. *Id.*
7. **RES JUDICATA.** — JUDGMENT IN SUMMARY PROCEEDINGS against attorneys for moneys received by them, denying the motion, is an adjudication that such attorneys were not liable, and precludes any further action against either of them to enforce any liability claimed to have existed when the motion was made. The fact that the plaintiff in the prior proceeding only asked for a final order requiring the defendants to pay over the money collected by them, and that such an order, if obtained, could not have been enforced by execution, does not impair the effect of the denial of the motion. A prior adjudication is not nullified by the failure of the moving party to ask for all the relief to which his pleadings entitle him. *Hawk v. Evans*, 247.
8. **FORMER ADJUDICATION NO BAR TO PROCEEDINGS UNDER CURATIVE ACT WHEN.** — An adjudication declaring void, for want of jurisdiction, an assessment and levy of a special tax by a board of supervisors is no bar to a subsequent proceeding to assess and levy a tax for the same purpose, under an act of the legislature referring to such adjudication, and intended to validate the prior proceedings of the board in ordering the work for which the tax was designed to pay. *Richman v. Supervisors*, 308.
See EXECUTIONS, 1-3; LANDLORD AND TENANT, 5; PLEADING, 4, 5.

JUDICIAL NOTICE

See EVIDENCE.

JURISDICTION.

JUDGE ACTING OUTSIDE HIS DISTRICT. — Where a magistrate goes outside the limit of his jurisdiction and undertakes to hold his court, he neither has jurisdiction of the subject-matter nor of the person, and no waiver or agreement there made before him can confer jurisdiction upon him. *Block v. Henderson*, 138.

JURY AND JURORS.

See TRIAL.

JURY TRIAL

See CONSTITUTIONAL LAW, 2; TRIAL.

JUSTICES OF THE PEACE.

1. MINISTERIAL ACT, LIABILITY OF JUSTICE OF PEACE FOR REFUSAL TO PERFORM. — The issuing of the writ of *retorno habendo* by a justice of the peace is an official act which it is his duty to perform, and as it is an act purely ministerial in its nature, involving no exercise of judgment or discretion, he is liable on his official bond for his refusal or neglect to perform it. *State v. Carrick*, 387.
2. CONDITION OF JUSTICE'S BOND EMBRACES REFUSAL TO PERFORM MINISTERIAL ACT. — The condition of the official bond of a justice of the peace, required by the act of 1876, chapter 28, that he "will truly and faithfully discharge, execute, and perform all and singular the duties and obligations of the office of justice of the peace," is broad enough to embrace the neglect or refusal to perform any ministerial act, the performance of which is devolved upon him by law. *Id.*

LANDLORD AND TENANT.

1. RIGHT TO RESERVE TITLE TO CROPS UNTIL RENT IS PAID. — A landlord when making a lease for a term of years may reserve the title to crops grown on the land until his yearly rent and advances are paid. *De Vaughn v. Howell*, 162.
2. WHERE THE LANDLORD RESERVES the title to the crops grown on the leased land until his rent and advances are paid, and during the term the tenant dies, whereupon the landlord takes possession and gathers the crop, the widow of the tenant is entitled to the balance of the proceeds of the sale thereof, after the landlord's rents and advances are paid for that year. *Id.*
3. FIXTURES. — A BAKER'S OVEN, BUILT BY THE TENANT upon the landlord's premises in such manner that it becomes a fixed and permanent structure, so united with the building that the two are inseparable without the destruction of the one and substantial injury to the other, and so built that, when taken down, it loses its character as an oven, and, with the exception of an iron lining and door, becomes mere brick and mortar, is not a removable fixture. *Collamore v. Gillis*, 460.
4. RECOUPMENT. — In an action for use and occupation, the tenant cannot recoup the cost of moving during his term, caused by an alleged breach of his lease, if at the end of the term he would have been put to the same expense in moving. *Eddy v. Coffin*, 441.
5. JUDGMENT AS EVIDENCE. — In an action for use and occupation, the tenant cannot place in evidence a judgment in a summary process by a third person against the landlord, when no execution has issued on such judgment, and the tenant has received no notice from such third person, has not attorned to him, but has held undisturbed possession under the landlord, until the end of his tenancy. *Id.*
6. LANDLORD'S LIEN, RECOUPMENT FOR AMOUNT OF. — If a landlord having a lien on a tenant's crop unlawfully converts it, he is, when sued for such conversion, entitled to have deducted from the damages otherwise allowable the amount of such lien. *Jones v. Horn*, 17.

LARCENY.

See CRIMINAL LAW, 36-40.

LEGACIES.

See WILL.

LIBEL AND SLANDER.

1. **WRITTEN OR PRINTED WORDS** which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libelous. *Hayes v. Press Company*, 874.
2. **OFFICE OF INNUENDO** is to aver the meaning of the language published; but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as surplusage. *Id.*
3. **QUESTION FOR JURY.** — Where a newspaper publication under the head-line "Hotel Proprietors Embarrassed," stating that judgment has been entered against the hotel proprietors on a note payable on demand, is alleged to be libelous, with an innuendo that the meaning of such publication was, that "plaintiff was in bad circumstances, insolvent, and unworthy of credit," it is for the jury to say whether the publication meant what is alleged in the innuendo; and if they find that it did, the publication is libelous. *Id.*
4. **PRIVILEGED COMMUNICATION.** — A publication in a newspaper under the head-line "Hotel Proprietors Embarrassed" that judgment has been entered against them on a note payable on demand is not privileged, but is libelous. *Id.*
5. **A MOTION FOR AN ORDER** against an attorney to compel him to pay over money collected by him, containing only the essential facts to entitle the plaintiff to the relief asked, is a privileged communication, and not libelous. *Hawk v. Evans*, 247.
6. **EVIDENCE OF CHARACTER.** — Plaintiff in action for slander cannot show his general good character and reputation as part of his main case, even though he is asked upon cross-examination in relation to specific acts, which, if true, might tend to discredit his character and reputation. *Hitchcock v. Moore*, 474.
7. **EVIDENCE OF CHARACTER.** — In slander, plaintiff's character is presumed to be of the best, and until it is assailed he cannot introduce evidence to add to or increase its virtue. *Id.*
8. **EVIDENCE — ANIMUS OF WITNESS.** — Where plaintiff in action for slander has testified to defendant's bitter feeling toward him because of certain divorce proceedings, he may be cross-examined fully as to such proceedings, in order to show his *animus*, motive, and bias. *Id.*
9. **PRIVILEGED COMMUNICATIONS.** — Plaintiff in action for slander cannot be compelled on cross-examination to divulge communications made by him to his divorced wife during marriage, nor can she testify thereto. *Id.*
10. **PLEADING AND PRACTICE.** — **CONVERSATION NOT SHOWN TO BE CONNECTED WITH THE SUIT** is inadmissible, and it is error to admit it, and after it is stricken out to allow counsel to comment upon it to the jury. *Id.*
11. **EVIDENCE IN MITIGATION OF DAMAGES.** — Defendant in slander cannot, in mitigation of damages, prove threats uttered by plaintiff against him, unless he can show that such threats were communicated to him before the time when he is alleged to have spoken the slanderous words. *Id.*

LIMITATION OF ACTIONS.

1. **MARYLAND STATUTE OF LIMITATIONS MAY BE PLEADED IN BAR** to the recovery in Maryland, against a stockholder of a corporation of New York,

for a debt of the corporation for which he is made liable by the laws of New York, and this defense may be interposed by demurrer. *Att-est v. Huntington*, 344.

2. WHERE TITLE IS ACQUIRED BY PATENT FROM THE UNITED STATES, the statute of limitations cannot operate against such patentee until his right to the patent becomes perfect, and such right is not perfect in one who has made an additional homestead entry under the laws of the United States until the patent certificate issues upon which such patent was based. *Nichols v. Council*, 20.
 3. POSSESSION OF LAND BY ONE HOLDING UNDER A CONTRACT for its purchase is the possession of his vendor, and is available by the latter in making out statutory period of limitation. *Mabary v. Dollarhide*, 639.
 4. POSSESSION, TO BE OF ANY AVAIL UNDER THE STATUTE OF LIMITATIONS, MUST BE ADVERSE as well as continuous. *Id.*
 5. CAUSE OF ACTION AGAINST A SHERIFF FOR NOT PAYING OVER THE PROCEEDS OF ATTACHED PROPERTY DOES NOT ACCRUE until there has been a final judgment in the attachment suit establishing plaintiff's right to such proceeds. This rule is not varied nor rendered inapplicable by the fact that there was an order of court made during the pendency of the action requiring such proceeds to be paid to the clerk of the court. *State v. Finn*, 654.
 6. PAYMENTS MADE BY THE SURETIES OF A SHERIFF WAIVE THE BAR OF THE STATUTE OF LIMITATIONS, which might have otherwise interposed for their protection. *Id.*
 7. ACTION TO SET ASIDE FRAUDULENT CONVEYANCE IS BARRED IN FIVE YEARS FROM DISCOVERY of the fraud, and the fraud will be presumed to be discovered when such conveyance is filed for record, unless the plaintiff shows that the knowledge with which he is charged by the recording of the deed was not available to him as a basis for further inquiry, which would have led to the discovery of the fraud. *Hawley v. Page*, 275.
 8. NOTICE OF FRAUD FROM RECORD OF DEED. — STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN until the actual discovery of a fraud, and hence an action is not barred in five years from the date of the recording of the deed, in a case where an action is brought to cancel a decree of foreclosure and the deed obtained thereunder, on the ground of fraud in obtaining the decree in violation of an agreement to dismiss the foreclosure proceedings, and in securing judgment for the mortgage debt after nearly the whole of it had been paid, and then by concealing from the mortgagor the fact that the decree of foreclosure and the deed had been made, obtaining from the latter the remainder of the amount of the mortgage; the mortgagee thus taking advantage of the ignorance of the mortgagor, whose confidential adviser he was, and making no demand for the possession of the property until the last payment had been made, the mortgagor all this time paying the taxes and making improvements on the property. *Jacobs v. Snyder*, 235.
- See EJECTMENT, 1; ESTATES OF DECEDENTS, 4; OFFICIAL BONDS, 1; PLEADING, 3; REMAINDERMEN AND REVERSIONERS; TRUSTS AND TRUSTEES, 5.

MALICIOUS ATTACHMENT.

See ATTACHMENT AND GARNISHMENT, 7-10.

MALICIOUS DESTRUCTION OF PROPERTY.

See **CRIMINAL LAW**, 42-44.

MARRIAGE AND DIVORCE.

See **FRAUDULENT CONVEYANCES**, 1-4.

MARRIED WOMEN.

See **NEGOTIABLE INSTRUMENTS**, 15; **PHYSICIANS AND SURGEONS**, 1.

MASTER AND SERVANT.

1. **TERMINATION OF EMPLOYMENT BY DEATH.** — Under a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employee, on the other, upon the life of the partnership, provided the death in either case is not voluntary. *Griggs v. Swift*, 176.
2. **TERMINATION OF EMPLOYMENT BY ACT OF GOD.** — Where a contract for personal yearly services to a partnership becomes impossible of performance by reason of the death of one of the partners, which works a dissolution of the partnership, the servant has no right to recover upon the same against the surviving partner for services never actually rendered. *Id.*
3. **FELLOW-SERVANTS, WHO ARE.** — A watchman whose duty it is to guard a crossing, and to signal approaching cars to stop and start, so that they may not pass each other on a particular curve, and a gripman in charge of one of such cars, are fellow-servants, and their common employer is not answerable to either for an injury resulting from the negligence of the other. *Murray v. St. Louis etc. R'y Co.*, 661.
4. **SERVANTS ARE IN A COMMON EMPLOYMENT** when they are engaged under the same master in the same general business. *Id.*
5. **MASTER IS NOT LIABLE FOR DAMAGES SUSTAINED BY EMPLOYEE FROM NEGLIGENCE OF CO-EMPLOYEE**, notwithstanding the latter was higher in authority than the one who received the injury. *Wilson v. Dunreath etc. Co.*, 304.
6. **MASTER IS NOT LIABLE FOR ACT OF EMPLOYEE IN DIRECTING USE OF UNSAFE MACHINERY**, where it is not shown that the latter had authority to direct what machinery or appliance should be used. *Id.*
7. **DECLARATIONS OF FELLOW-SERVANT, NOT PART OF RES GESTÆ, INADMISSIBLE.** — Declarations or admissions of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence against the principal or master. *Id.*
8. **EVIDENCE OF CONTRIBUTORY NEGLIGENCE, WHAT ADMISSIBLE.** — Where an action is brought by an employee to recover damages for an injury sustained by him in riding down a tramway in a car, evidence that the plaintiff had been warned of the danger of getting on the car, and that he knew it was a perilous ride, is admissible, as bearing upon the question of contributory negligence. *Id.*
9. **EVIDENCE.** — To SHOW WANT OF CARE EITHER IN EMPLOYING OR RETAINING A SERVANT, it is competent to put in evidence his general reputation of unfitness for the duties assigned him, and also to prove specific acts of negligence or incompetency, knowledge of which has been brought home to his employer. *Grube v. Missouri P. R'y Co.*, 645.

10. **SERVANTS INJURED OUT OF LINES OF THEIR USUAL DUTY.** — In case of an emergency, a servant may of his own volition step outside of his usual duty. If the departure be such a one as the necessity of the case fairly and reasonably calls for, keeping in view the character of the work which the servant has contracted to perform, then such departure will not of itself defeat a recovery of damages in case he is injured. *Barry v. Hannibal etc. R'y Co.*, 610.
11. **RISKS ASSUMED BY CONSTRUCTING ENGINEER OF RAILROAD BY VIRTUE OF HIS EMPLOYMENT.** — An engineer employed in the construction of a railroad track, but not responsible for its condition after it is laid, assumes, by virtue of his employment, such risks as are incident to the operation of trains upon such a track in a reasonably prudent and careful manner; but he does not assume risks which are the result of running trains at an unreasonably high rate of speed over a track in a bad and dangerous condition. And if he is injured by the derailment of a train through the company's negligence in caring for and keeping the newly made track in place, and in running such train at a dangerously rapid rate over a wet and yielding track, the company will be liable. *Meloy v. Chicago etc. R'y Co.*, 325.
12. **MINOR SERVANTS ASSUME THOSE ORDINARY RISKS OF THEIR SERVICE** which are obvious to them, or which have been pointed out in a manner suited to their youth and inexperience. They cannot ignore the duties of common prudence or the instruction of their superiors to guard themselves from apparent danger consequent upon their employment. *Smith v. Irwin*, 699.
13. **EMPLOYER OF A MINOR, WHEN THE EMPLOYMENT IS HAZARDOUS** in its nature, is under the duty to give him notice of the danger, and such instruction as will enable him to comprehend and avoid it. These instructions and precautions must be so graduated to the youth's ignorance and inexperience as to make him fully aware of the danger to him, and to place him substantially in the same position as if he were an adult. *Id.*
14. **NEGLIGENCE IN THE MANAGEMENT OF HAND-CAR.** — Where the evidence shows that an engineer was killed by being run over by a hand-car, and that such car was being run at a high rate of speed, and at a time when it had no right to be on the track, when the persons operating it knew that the train-men would be at work, and would not be on the watch for it, and were not on close watch of the track in advance of them, and that if they had been they would have seen the deceased, it sufficiently appears that such hand-car was negligently operated, and that, from this cause, such engineer came to his death. *Barry v. Hannibal etc. R'y Co.*, 610.
15. **CONTRIBUTORY NEGLIGENCE IN NOT OBEYING RULES OF A RAILWAY CORPORATION.** — An engineer should not be held guilty of contributory negligence, on a demurrer to the evidence, because, when injured, he was not on his engine, as required by a rule of the company, if it further appears that there was an established usage of the defendant's engineers known and acquiesced in by its superior officers, to allow engineers to alight from their engines, and to permit their firemen to make short moves, the engineers remaining sufficiently near to give directions. This custom amounted to an abandonment of the rule to the extent of the custom. *Id.*

See CARRIERS; NEGLIGENCE; RAILROAD COMPANIES.

MERGER OF CRIMES.

See CRIMINAL LAW, 40.

MISTAKE.

See ARBITRATION AND AWARD, 1, 3.

MORTGAGES.

1. **PARTIES.** — MORTGAGEES are properly made parties defendant to a suit in equity the result of which may be to impair their security. *Everett v. Edwards*, 462.
2. **A MORTGAGEE WHILE PROSECUTING AN ACTION** on the equity side of the court for foreclosure of his mortgage, in which he asks that execution may be awarded him for any balance left unpaid by the proceeds of the sale of the mortgaged premises, cannot at the same time maintain an action on the law side of the court on his note or bond. *Anderson v. Pilgram*, 917.
3. **WHERE SEVERAL NOTES, MATURING AT DIFFERENT TIMES**, are secured by one mortgage, and an action to foreclose it is commenced, and based on one of the notes then overdue, the mortgagee may maintain an action at law on another of the notes when it matures, and while the foreclosure suit is still pending. *Id.*
4. **WHEN A MORTGAGE IS MADE TO SECURE SEVERAL NOTES** which mature at different times, and are assigned to different persons, and the proceeds of the mortgaged property are not sufficient to pay all of the notes, such proceeds must be distributed among the different holders *pro rata*, irrespective of the dates of the assignments or of the maturity of the different notes. *Penzel v. Brookmire*, 23.
5. **EQUITABLE MORTGAGE.** — ANY AGREEMENT WHICH SHOWS AN INTENTION TO CREATE A LIEN is an equitable mortgage. Therefore a promissory note, followed by the statement that the note is given "as aid for that of the purchase-money" of a certain parcel of land, a description of such land, and the further statement that a "vendor's lien is hereby reserved on such land for the purchase-money," constitutes an equitable mortgage, though not given to the vendor of the land described. *Bell v. Pelt*, 57.
6. **DAMAGES, WHERE DEFENDANT HAS A SPECIAL LIEN OR INTEREST.** — If the defendant is a mortgagee, and as such is entitled to the possession of and is vested with power to sell property which he unlawfully seizes, and he becomes a wrong-doer by reason of his manner of acquiring possession, or of some irregularity in making the sale, he is liable to his mortgagor only for the value of the property at the time of the conversion, less the amount of the mortgage lien. *Jones v. Horn*, 17.
See APPEAL AND ERROR, 1; CHATTEL MORTGAGES.

MOTIONS.

See PLEADING, 4, 5.

MUNICIPAL CORPORATIONS.

1. **LIABILITY FOR STREETS DEFECTIVE FOR WANT OF FUNDS.** — Want of funds, and an absence of power to raise money by taxation or otherwise, or to enforce contributions of labor from the residents of the town, to
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repair its streets will free a municipality from responsibility for injuries sustained from defective streets and sidewalks. This rule does not apply when the city charter gives extensive powers of taxation for the purpose of laying out and improving its streets and avenues. *Whitfield v. City of Meridian*, 596.

2. **LIABILITY FOR DEFECTIVE STREETS.** — A city is not called upon to open new streets in advance of public needs, and even where a street has been accepted, a different and less degree of care may suffice for one infrequently used than for those in the heart of the city. Because a street is little used, the city cannot permit pitfalls and dangerous precipices to be made or continued in it without becoming liable in damages therefor. *Id.*
3. **NOTICE PRESUMED OF DEFECTIVE STREET.** — City must know, and repair within a reasonable time, defects in its streets. If a street has been in a dangerous condition for five or six years, it is presumed that the city knew or ought to have known of such condition, and it is liable in damages to one who is injured through such condition of the street. *Id.*
4. **NOTICE OF DEFECTS IN STREET.** — One who has sustained damage need not prove that the city had actual notice of the defect in the street which caused the damage. The circumstances of each case must determine whether constructive notice of the defect is to be attributed to the city, but where the defect is manifest, and of such dangerous character as to obtrude its existence upon a casual observer, and has existed through many years, the city is guilty of negligence and liable in damages. *Id.*
5. **NOTICE — NEGLIGENCE.** — A municipal corporation cannot be held liable for damages occurring by reason of a defect in its streets, sidewalks, sewers, or bridges, when it had no notice thereof, nor when such defect has not existed for sufficient time from which notice can be inferred; provided the corporation has been guilty of no negligence in constructing or repairing the same. *Mayor of Montezuma v. Wilson*, 150.
6. **NEGLECT — PROXIMATE CAUSE — REMEDY.** — Where a city, in constructing a sewer, negligently uncovers a water-pipe and leaves it exposed so that the water in it is allowed to freeze, thus cutting off the supply of a party with whom the city is under contract to furnish water, so that he cannot by the use of reasonable diligence obtain a supply from that or other sources, and is thereby injured, he may maintain an action of tort against the city for damages, and need not rely on his action on his contract, as the exposure of the supply-pipe is the proximate cause of the injury. *Stock v. City of Boston*, 430.
7. **LIABILITY FOR NEGLIGENCE.** — The liability of a city or town for the negligence of its officers or agents depends upon whether it is exercising governmental duties, or powers and privileges conferred for its own benefit. *Moffitt v. Asheville*, 810.
8. **LIABILITY FOR NEGLIGENCE.** — Municipal corporations, acting within the purview of their authority, and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character. *Id.*

9. **LIABILITY FOR NEGLIGENCE.** — Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the public benefit, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute imposes such liability; as, for example, a city is not liable in damages for an assault with excessive force, committed by its peace-officer in making an arrest for an assault. *Id.*
10. **DUTIES AND LIABILITIES IN RELATION TO PRISONS.** — Under the constitution and laws of North Carolina, a city is liable in damages only for a failure, either to so construct its prison, or to provide it with fuel, bed-clothing, heating apparatus, attendance, and such other things necessary, as to secure to the prisoners committed to it a reasonable degree of comfort, and protect them from such bodily suffering as would injure their health; and when the city has complied with such requirements, it is not liable for the sickness or suffering of a prisoner, even if caused by the neglect of the jailer, policeman, or attendants to keep fires burning all night, or to give the prisoner necessary bed-clothing. *Id.*
11. **DUTIES IN RELATION TO PRISONS.** — It is the duty of the governing officers of a municipal corporation to exercise ordinary care in procuring articles essential to the health and comfort of prisoners in its prison, and of superintending their subordinates in immediate control, so far, at least, as to replenish the supply of such necessary articles, when notified that they are needed, and of employing such agents, and raising and appropriating such money, as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Id.*
12. **LIABILITY FOR NEGLECT OF JAILERS.** — Neither counties nor towns are required, as a general rule, to answer in damages for injuries to prisoners caused by the neglect of their respective jailers, policemen, or guards, who may have immediate charge and custody of them, and of which the governing officials of such corporations have no notice. *Id.*
13. **LIABILITY IN RELATION TO PRISONS.** — Where the window-glass in the window of a police prison has been broken, and the bed-clothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such superintendence of the prison as would naturally be expected to give them timely information of its condition, there is not such failure in discharging their duties as will subject the corporation to liability in damages, in the absence of proof that they retained careless or incompetent jailers or servants after notice of their character. *Id.*
14. **RAILWAYS—SPEED OF TRAINS.** — A STATE HAS POWER TO REGULATE THE SPEED OF TRAINS, and to make other reasonable regulations for the movement of locomotives and trains of cars in cities, towns, and other public places. *Grube v. Missouri P. R'y Co.*, 645.
15. **RAILWAYS — MUNICIPAL CORPORATIONS.** — THE POWER TO ENACT REGULATIONS OF SPEED OF CARS AND TRAINS on railways may be delegated to cities and towns. *Id.*
16. **RAILWAYS — MUNICIPAL CORPORATIONS, POWER OF, TO REGULATE SPEED OF TRAINS WHILE RUNNING OVER PRIVATE PROPERTY.** — An ordinance of a city regulating the speed at which trains may be moved in such city is applicable while such trains are being run over private lands of a rail-

- way corporation in a populous city, when such lands are not within any inclosure, and are open to the public. *Id.*
17. **RAILWAYS — MUNICIPAL CORPORATION, CONSTRUCTION OF ORDINANCE OF.** — An ordinance of a municipal corporation which prohibits the movement of cars and locomotives and trains for any purpose whatever, except there be displayed on the moving front a light, controls the movements of trains on the private switch-yards and grounds of the railway company as well as on the streets and other public places. *Id.*
18. **STREET-RAILROAD — RIGHTS OF ABUTTING OWNER.** — The construction and operation of a railroad in the street in front of the property of an abutting owner, without his consent, and without his being compensated, is an invasion of his legal rights, for which he may recover damages. *Theobald v. Louisville etc. R'y Co.*, 564.
19. **STREETS ARE ESTABLISHED** for the accommodation of the public generally, in passing from place to place, and for other incidental and necessary uses. They are for the benefit of all, and no one has any exclusive rights or privileges therein. *Id.*
20. **STREET-RAILROADS ARE PERMANENT STRUCTURES** in the streets, the use of which are private and exclusive. They confer upon individuals or corporations rights which are incompatible with those of the public or of adjacent proprietors. *Id.*
21. **LAYING OUT OF PUBLIC STREETS** creates two co-existent rights, one belonging to the public, to use and improve them for ordinary purposes, the other belonging to the abutting owner, to have access to and from his property over them, and to make such use of them as is customary and reasonable. Both are valuable, and each is inviolable. *Id.*
22. **ABUTTING OWNER'S RIGHT TO USE THE STREET** as a street is as much property as the street itself, and neither the public, a corporation, nor an individual can lawfully deprive him of it, against his will, without compensation. *Id.*
23. **WHERE STREETS ARE NEEDED FOR RAILROAD PURPOSES**, or for any other purpose inconsistent with the ordinary use of a public street, the rights and interests of the abutting owners must be obtained, with their consent, or by the exercise of the right of eminent domain. *Id.*
24. **STREET-RAILROADS — RIGHTS OF ABUTTING OWNERS.** — Where the public have only an easement in the street, and the fee is in the abutting owner, a steam-railroad cannot be lawfully constructed and operated thereon against his will and without compensation. *Id.*
25. **STREETS — RIGHTS OF ABUTTING OWNERS.** — Where the fee to a street is in the public, free from any trust or duty, it may be disposed of for any purpose that the public may deem proper; but whether the abutting owner has simply an easement in the street while the fee is in the public, or some other person, or whether he has both the fee and an easement, he is entitled to require that nothing shall be done in derogation of his rights, without his consent, or without compensation. *Id.*

See **ANIMALS**, 2; **NOTICE**, 12; **SCHOOLS**.

MURDER.

See **CRIMINAL LAW**, 23-35.

MUTUAL BENEFIT ASSOCIATIONS.

See **INSURANCE**, 6-12.

NEGLIGENCE.

1. **ORDINARY CARE IS SUCH AS A PERSON OF ORDINARY PRUDENCE AND CAUTION**, according to the standard of the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the person whose conduct in that regard is in question in a given case. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
2. **PROXIMATE CAUSE OF INJURY.** — Where a person wrongfully and negligently opens, and leaves open, the fence of an inclosure surrounded by a country largely fenced with barbed wire, which is especially dangerous to valuable horses running at large, and a highly bred mare escapes from such inclosure through the opening in the fence, and is injured by becoming entangled in a barbed-wire fence, the wrongful and negligent act of such person in opening and leaving open the fence is the proximate cause of the injury. *West v. Ward*, 284.
3. **WHERE A CITY RAILROAD COMPANY** is engaged in laying a track in a public street, and negligently leaves rails projecting beyond a temporary barrier inclosing the place where the track is being laid, it is liable in damages to one, who, traveling at night, and exercising due care, is injured by coming in contact with such projecting rails, notwithstanding the fact that the injury was sustained at other than a regular street crossing, and that the work was being done by an independent contractor. *Woodman v. Metropolitan R. R. Co.*, 427.
4. **DAMAGES FOR PERSONAL INJURY FROM UNGUARDED ELEVATOR-WELL.** — Where the opening in the wall of a building for access to an elevator from a street is outside the limits thereof, the owner or occupier of the building and elevator is not liable in damages to one who is injured by being pushed into and falling down the elevator-well, while the elevator is in use, in the absence of proof of negligence in such owner or occupier, or that the opening was not so constructed as to be closed by doors or proper barrier when the elevator was not in use. *McIntire v. Roberts*, 432.
5. **WHEN A QUESTION OF LAW.** — The court cannot properly pronounce certain facts to constitute negligence, as a question of law, unless no other inference may be fairly and reasonably drawn from the testimony on the subject. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
6. **WHETHER BY THE USE OF ORDINARY CARE** a pregnant woman could avoid the consequences to herself of the negligence of a railway company in not providing a safe and suitable landing-place to alight from the cars, the conductor having designated the place as suitable and assisted her to alight, is a question for the jury. The matter being doubtful, and the doubt not being soluble by the record to the satisfaction of this court, the judgment of the superior court denying the company a new trial will not be reversed. *Georgia Railroad and Banking Co. v. Urry*, 140.
7. **THE LIKE RULE HOLDS TOUCHING THE QUESTION** whether, after receiving the injury, the woman could, consistently with ordinary prudence, undertake a short journey to reach her home, rather than remain at the station and take immediate precautions to obviate the threatened consequences. *Id.*
8. **QUESTION FOR JURY.** — An engineer will not be adjudged guilty of negligence, as a matter of law, merely from the fact that he stood upon the railway track from five to thirty seconds without looking for approaching cars, when he had no reason to apprehend the approach of the car by which he was injured. *Barry v. Hannibal etc. R'y Co.*, 610.

9. **WHEN A QUESTION OF LAW AND WHEN OF FACT.** — If, upon a given state of facts, negligence can be clearly asserted, then the court may so declare; but if reasonable men may differ as to the conclusions to be drawn from the governing facts, then the question of negligence must be determined from all the surrounding circumstances. It then becomes a question of mingled law and fact, and must be determined by a jury. *Id.*
10. **CONTRIBUTORY NEGLIGENCE.** — IT CANNOT BE HELD AS A MATTER OF LAW that an engineer was guilty of contributory negligence from the fact that he left his engine for the purpose of getting signals, when it was no part of his general duty to do so. *Id.*
11. **QUESTION FOR JURY — PRESUMPTION IN FAVOR OF INFANT.** — A child of tender years is *prima facie* exempt from responsibility. If he is of exceptional maturity and capacity, or capable of taking care of himself under the circumstances, these facts must be pleaded, and then the testimony on the question of capacity left to the jury as a question of fact, and not determined by the court as a question of law. *Westbrook v. Mobile etc. R. R. Co.*, 587.
12. **CONTRIBUTORY NEGLIGENCE, QUESTION OF, PROPERLY SUBMITTED TO JURY WHEN.** — Where at the time an accident occurred, through which the plaintiff was injured, he was riding in a caboose, used as a tool-car, near the engine, and there was, at the other end of the train, an old box-car, fitted up as a way-car, but it did not appear that he knew that the box-car was a stronger or safer car to ride in than the caboose, and it further appeared that the box-car was no better adapted to the use of travelers than the caboose, but was less convenient, and there was evidence tending to show that he was, on the occasion of the accident, one of a wrecking-crew, riding in the place assigned to them, the question whether he was guilty of contributory negligence in riding in the caboose instead of in the box-car was properly submitted to the jury, although the event showed that he would not have sustained the injury had he been riding in the box-car at the time the accident happened. *Meloy v. Chicago etc. R'y Co.*, 325.
13. **INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.** — In an action against a railway company for damages for personal injury, an instruction that if the injured party was in the employ of defendant, and guilty of contributory negligence, his widow could not recover, is properly refused, when the injured party was not on duty at the time of the accident, but was remotely removed from the scene of his duties. The same rule was then applicable to him as applies to the general public. *Savannah etc. R'y Co. v. Flannagan*, 183.
14. **INSTRUCTIONS REGARDING MUST BE SPECIFIC.** — In an action to recover for personal injuries, where contributory negligence is attributed to plaintiff, it is not sufficient to instruct the jury generally that if plaintiff is guilty of contributory negligence he cannot recover; but the court must explain to the jury what facts would constitute such negligence in view of the evidence adduced. *New York etc. R. R. Co. v. Enckes*, 848.
15. **CONTRIBUTORY NEGLIGENCE — PRESUMPTION IN FAVOR OF INFANT.** — Child four or five years of age is not, as a matter of law, chargeable with contributory negligence, and barred from recovery in an action brought by him or in his behalf for injury inflicted upon him by another, because he did not exercise reasonable care to avoid the injury. *Westbrook v. Mobile etc. R. R. Co.*, 587.

- 16. NEGLIGENCE ON THE PART OF THE PLAINTIFF WILL NOT PRECLUDE HIM FROM DAMAGES SUFFERED FROM THE NEGLIGENCE OF THE DEFENDANT, UNLESS plaintiff's negligence contributed to the injury which he suffered.** *Smith v. Irwin*, 699.
- See CARRIERS; EVIDENCE, 9-13; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; PARENT AND CHILD, 8-10; PHYSICIANS AND SURGEONS; RAILROAD COMPANIES.**

NEGOTIABLE INSTRUMENTS.

- 1. BLANK SPACES IN PROMISSORY NOTE, EFFECT OF LEAVING.** — The fact that blank spaces sufficient to admit of alterations in the amount are left in a promissory note at the time when the indorser thereof writes his name upon it, does not constitute such negligence on his part as will render him liable to an innocent holder for value for the amount to which the note is afterwards wrongfully raised without the indorser's knowledge or consent. The indorser's assent to the alterations cannot be inferred from the fact that blank spaces were left in the note, in which there was room to insert a larger sum. *Burrows v. Klunk*, 371.
- 2. MATERIAL ALTERATION OF PROMISSORY NOTE DISCHARGES INDORSER.** — Where a promissory note is complete at the time of its indorsement, an alteration in the amount thereof subsequently made without his knowledge or consent discharges him from all liability thereon. *Id.*
- 3. RESCISSION OF DRAFT.** — An indorser of a draft who deposits it with a bank, known by its officers at the time to be insolvent, may rescind and stop payment of it upon discovering the insolvency of the bank. *First Nat. Bank v. Strauss*, 579.
- 4. RECEIVING OR ACCEPTING NEGOTIABLE PAPER before maturity as security for a pre-existing debt does not constitute the holder a purchaser for value, in Mississippi.** *Id.*
- 5. GARNISHMENT OF NEGOTIABLE INSTRUMENTS.** — The *bona fide* holder of a note indorsed to him before maturity may recover of the maker the amount thereof, with interest and costs, notwithstanding the fact that such maker has been examined in a supplementary proceeding against the payee, to which the holder was not made a party, and in which the maker admitted the indebtedness to the payee, and under order of court paid part of the amount due on the note to the plaintiff in such proceeding. To protect himself, the maker should have put the ownership of the note in issue in the supplementary proceedings. *Rice v. Jones*, 801.
- 6. PRESUMPTION OF PAYMENT OF NOTE UNDER SEAL** does not arise until twenty years have elapsed from the time it matured; and the circumstance that the maker was able to pay will not rebut such presumption. *Morrison v. Collins*, 827.
- 7. PAYMENT OF NOTE — PRESUMPTION THAT NOTE UNDER SEAL** has not been paid until the expiration of twenty years from the time of its maturity can only be rebutted by proof of facts which would justify the jury in finding the fact of payment within twenty years. Thus proof that the holder had been constantly pressed for money, while the maker was abundantly able to pay, may justify the finding of payment within such time. *Id.*
- 8. PRESUMPTION AS TO PAYMENT OF NOTE — BURDEN OF PROOF.** — It is presumed that a note under seal has not been paid until the expiration of twenty years from its maturity; and the burden of proof is upon the

maker to show payment within twenty years, or facts from which the jury may properly infer payment. *Id.*

9. **LIABILITY OF INDORSERS.** — One who obtains possession of a bill or note, after indorsing it, is restored to his original position, and cannot, nor can a purchaser from him with notice of the facts, hold intermediate indorsers liable who could look to him again; and when such indorsements are in blank, parol evidence is admissible to show the relation in which they stand. *Adrian v. McCasill*, 788.
10. **LIABILITY OF INDORSERS.** — The purchaser of a note from the original payee, bearing upon its face the fact that he was also the first indorser, is chargeable with notice that subsequent indorsers were the indorsees of the payee. *Id.*
11. **LIABILITY OF INDORSERS.** — *Bona fide* purchaser of a note, without any knowledge or notice of the relation sustained by prior indorsers to the note, may fill a blank indorsement by making it payable to himself or any one else. This rule does not apply, however, to a purchaser from the payee or a prior indorser. *Id.*
12. **LIABILITY OF ACCOMMODATION MAKER OF NOTE.** — The cashier of a national bank, who is a debtor of the bank, and who procures the making or indorsing of a note for his own accommodation, cannot make an agreement binding upon the bank that there shall be no liability upon the note. Such agreement is beyond his powers as cashier, and consequently the bank is not bound. *Allen v. First Nat. Bank*, 829.
13. **LIABILITY OF ACCOMMODATION MAKER OF NOTE.** — An accommodation maker of a note which has been discounted by a bank cannot defend payment on the ground that the bank in discounting it loaned in excess of the legal limit of one tenth of its capital. *Id.*
14. **ACCOMMODATION INDORSER.** — A collateral oral agreement between the maker and an accommodation indorser of a note that it shall be payable at a certain bank does not affect a purchaser of the note for value, and before maturity, from the maker, with notice of the agreement. *Parker v. Sutton*, 795.
15. **ACCOMMODATION INDORSER OF THE NOTE OF A MARRIED WOMAN** cannot escape liability on the ground of her coverture. His indorsement is an implied guaranty that the maker was competent to contract in the manner in which, by the terms of the paper, she purported to contract. *Edmunds v. Rose*, 704.

See **BANKS AND BANKING; BANKRUPTCY AND INSOLVENCY; MORTGAGE, 2-4.**

NEW TRIAL.

1. **WHERE PLAINTIFF RECOVERS** on a different cause of action from that set out in the declaration, the verdict and judgment are contrary to law, and a new trial should be awarded. *Mayor of Montezuma v. Wilson*, 150.
2. **ALTHOUGH IN STRICT PRACTICE A RULE NISI FOR A NEW TRIAL** seems requisite, yet it need not be separate from the motion, nor be signed by the judge, if the judge on hearing the motion can and will recognize as the rule that which has been signed by counsel. More especially is this so where opposing counsel has also recognized it in his acknowledgment of service. If such irregular rule has not been entered on the minutes, it may by order of the judge be entered *nunc pro tunc*. *Georgia etc. B'k'g Co. v. Ury*, 140.

2. **WHERE THE COURT ERRONEOUSLY RULES** as to the number of peremptory challenges to be allowed, and after this right has been partially exercised, the ruling is corrected, and the number of such challenges lessened, but the parties are still allowed the full number of challenges sanctioned by law, there is not such error as will be ground for a new trial. *State v. Jacob*, 807.

See **APPEAL AND ERROR**.

NOTICE

1. **NAME "HESSER" AND "HESSE"** ARE SO DISSIMILAR that one searching for encumbrances against the former would not be charged with notice of a judgment against the latter, nor put upon inquiry. *Aetna Life Ins. Co. v. Hesser*, 297.
2. **EVERY ONE IS AUTHORIZED TO RELY ON FULLNESS AND CORRECTNESS OF INDEX** of all liens in the district court, which the clerk is by law required to keep in a book as a record of his office. *Id.*
3. **"INDEX OF ALL LIENS"** SHOWS ALL JUDGMENTS IN THE COURT to which the records pertain. And if such liens may be found by consulting other indexes, the searcher is not required to resort to such other indexes after having examined the "index of all liens," for he is authorized to rely upon its fullness and accuracy. *Id.*
4. **PURCHASER WITHOUT ACTUAL NOTICE IS NOT BOUND BY JUDGMENT NOT INDEXED**, because the record required by the statute to impart constructive notice does not exist if the index required by statute be wanting. *Id.*
5. **PURCHASER OF LAND IS CONCLUSIVELY PRESUMED** to know what appears on the face of the deeds under which he claims. *Stewart v. Matheny*, 538.
6. **TENANT FOR LIFE — CLAIM FOR IMPROVEMENTS.** — Purchaser of land must take notice of his title as being a life estate or a fee, when that title is disclosed by the records. If he purchases a life estate and erects permanent improvements, he cannot charge the remainderman with their value upon the termination of the life estate. *Id.*

See **CHATTEL MORTGAGES**, 1, 2, 3; **JUDGMENTS**, 1-4; **LIMITATION OF ACTIONS**, 7, 8; **MUNICIPAL CORPORATIONS**, 3, 4, 5; **SALES**, 4; **SCHOOLS**, 2.

NUISANCES.

1. **PUBLIC NUISANCE — REMEDY OF PRIVATE INDIVIDUAL.** — The obstruction of a navigable river is a public nuisance, the remedy for which is by indictment; but an individual who has sustained any particular, special injury, over and above that sustained by the public generally, as the direct result of such obstruction, may also sustain a civil action to recover damages, and in this respect a plaintiff, though a chartered corporation, stands upon the same footing as any private individual. *Steamboat Co. v. Railroad Co.*, 923.
2. **PUBLIC NUISANCE — PLEADINGS BY PRIVATE PARTY SEEKING DAMAGES.** — In an action by a private individual to recover damages for a public nuisance in obstructing the navigation of a navigable stream, the plaintiff must allege and prove a special and peculiar damage to his property, differing in kind from that sustained by the general public and resulting directly from the obstruction complained of. But expense incurred in seeking to overcome such obstruction is not such special injury as will support an action. *Id.*

3. EVIDENCE THAT ANOTHER SEWER DID NOT PRODUCE OFFENSIVE SMELLS IS NOT ADMISSIBLE in an action for a nuisance caused by maintaining a sewer which emptied near the plaintiff's house, where it is not proposed to show that the two sewers were alike in their construction, and not subject to different conditions in their use. *Randolf v. Bloomfield*, 268.
4. NUISANCE TO HOMESTEAD, MEASURE OF DAMAGES FOR, NOT CONFINED TO RENTAL VALUE. — In an action to recover damages for a nuisance affecting the plaintiff's homestead, he is entitled to recover for the inconvenience and discomfort suffered, and the deprivation of the comfortable enjoyment thereof by himself and his family, and he is not limited to the damages sustained by the depreciation of the rental value of the property. *Id.*
5. PLAINTIFF, BY MAINTAINING ANOTHER NUISANCE OF HIS OWN, DOES NOT CONTRIBUTE to the injury caused by the maintenance of a nuisance by the defendant. The doctrine of contributory negligence does not apply to such a case. *Id.*

See INJUNCTIONS, 2.

OFFICE AND OFFICERS.

See ATTACHMENT AND GARNISHMENT, 2-5; CORPORATIONS, 2; CRIMINAL LAW, 24-27; JUSTICES OF THE PEACE, 1, 2; OFFICIAL BONDS; REWARDS, 1, 2.

OFFICIAL BONDS.

1. LIABILITY OF SURETIES. — An action against a court clerk and his sureties for his failure to properly enter a judgment is an action on his official bond, and as such bond is not for the payment of money only, within the meaning of the statute, the right of action against the principal and sureties is not barred until the expiration of twenty years, under section 111, Code of South Carolina. *Strain v. Babb*, 905.
2. MEASURE OF DAMAGES IN ACTION ON OFFICIAL BOND. — Where a judgment lien loses its rank through the neglect of a court clerk to enroll it, the measure of damages in an action on his official bond is the amount lost through such neglect, depending upon the amount of such lien, of junior liens, and of the value of the judgment debtor's property. *Id.*
3. JUDGMENT, IN ACTIONS ON OFFICIAL BONDS, should go for the penalty, and stands for the benefit of all injured parties, who, by proper proceeding, may have their damages assessed, with leave to issue execution. *Id.*
4. SURETIES ON AN OFFICIAL BOND ARE NOT ANSWERABLE FOR DEFAULTS OCCURRING PRIOR TO ITS EXECUTION, unless made so by its terms. *State v. Finn*, 654.
5. OFFICIAL BONDS, WHEN COVER PRIOR DEFAULTS. — A bond of a sheriff, which recites that it is a new official bond given by order of court in lieu of the first bond, renders the sureties thereon responsible for their principal's conduct during his entire term of office. They are, therefore, answerable for his defaults committed prior to the execution of such bond. *Id.*

See JUSTICES OF THE PEACE, 1, 2.

PARENT AND CHILD.

1. ADOPTION IS THE ACT BY WHICH RELATIONS OF PATERNITY and affiliation are recognized as legally existing between persons not so related by nature. *Morrison v. Sessions*, 500.

2. **EFFECT OF ADOPTION IS TO CAST SUCCESSION ON THE ADOPTED CHILD** in case the adopting father dies intestate. The change of name is more an incident than an object of such proceedings. *Id.*
3. **ADOPTED CHILD MORE THAN SEVEN YEARS OF AGE** at the time of his adoption will be presumed to have assented thereto, if for his benefit, unless his dissent expressly appears. *Id.*
4. **HABEAS CORPUS FOR CUSTODY OF INFANT — ORDER WHICH MAY BE MADE.** — When the subject of a writ of *habeas corpus* is a child, or other person not capable of self-protection, the court may take the subject of illegal restraint from the custody of one person and hand it over to another. The court may stop with a mere removal of restraint, or it may, in its discretion, go further, and determine, for the time being, the custody of the subject of the writ. *Richards v. Collins*, 726.
5. **POWER OF CHANCERY OVER CUSTODY OF.** — The court of chancery has an inherent jurisdiction with respect to the right of custody of children, and, in the exercise of this jurisdiction, may permanently fix the *status* of infants, even in disregard of the legal rights of parents, where the welfare of the infants requires it. Nor is it material to the exercise of this power in what way the subject is brought into court. *Id.*
6. **RIGHT OF PARENTS TO CUSTODY OF CHILDREN.** — It is the strict legal right of the parents, and those standing in *loco parentis*, to have the custody of their infant children, as against strangers; but the court will not regard this right as controlling, when to do so would imperil the personal safety, morals, health, or happiness of a child. *Id.*
7. **CUSTODY OF CHILDREN, WISHES OF, WHEN WILL BE CONSIDERED IN DETERMINING.** — When resolving the question what will best subserve the interest and happiness of a child, its own wish and choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment. The wishes of children of sufficient capacity should be given especial consideration when their parents have for a long time voluntarily allowed them to live in the family of another. A parent, by transplanting his offspring into another family, and surrendering all care of it for so long a time that its interests and affections attach to the adopted home, thereby seriously impairs his right to have its custody awarded to him by judicial decree. *Id.*
8. **INFANTS HAVE LEGAL RIGHTS DISTINCT FROM THEIR PARENTS** to security from personal injuries caused by the negligence or willful wrong of others; and the negligence of the parent is no excuse for the abuse or misuse of the child by another. *Westbrook v. Mobile etc. R. R. Co.*, 587.
9. **CONTRIBUTORY NEGLIGENCE OF PARENT TOWARD CHILD.** — In an action for negligent injury to an infant, brought by a parent for the latter's benefit, the contributory negligence of the parent is a bar to the action, except when the injury to the child was committed wantonly, willfully, or recklessly. *Id.*
10. **CONTRIBUTORY NEGLIGENCE OF PARENT.** — Failure of parent to guard and protect his infant child from danger is negligence, and if it contributes directly to an injury sustained by the child, the parent is guilty of contributory negligence, and cannot recover for the injury in his own behalf, except where the injury was inflicted wantonly, recklessly, or willfully; but when the action is brought by the child, or for his benefit, the negligence of the parent cannot be imputed to the child. *Id.*
11. **DAMAGES TO A FATHER FOR THE DEATH OF HIS SON.** — An instruction to a jury, in an action by a father to recover for the death of his son, that

the measure of damages is the probable earnings of the deceased during his expectancy of life, less his expenses, taking into consideration his age, business capacity, habits, health, and energy, is erroneous, because the expectancy of the life of the son was much greater than that of the father, and the jury, in following the instructions, must give the father damages for a period of time after the probable termination of his life. *Fordyce v. McCants*, 69.

12. DAMAGES CAN BE RECOVERED BY A FATHER FOR THE DEATH OF HIS SON ONLY by showing that deceased gave assistance to his father, as by contributing money to his support, or that the father had a reasonable expectation of pecuniary benefit from the continued life of the son. In the absence of such proof, only nominal damages can be recovered. *Id.*

See CONFLICT OF LAWS, 2.

PARTITION.

1. INFANT CHILDREN ARE AS MUCH BOUND BY PARTITION PROCEEDINGS as adults, if they are regularly brought into court, and guardians appointed for them. *Sites v. Eldredge*, 769.
2. PARTITION PROCEEDINGS VALID AS TO PARTIES IN COURT. — Proceedings in partition are not void or voidable as to parties who are actually or constructively in court, even though the court does not acquire jurisdiction of all the parties interested in the real estate. If the persons not made parties are satisfied, those who were cannot be heard to complain. *Williams v. Wescott*, 287.
3. SERVICE BY PUBLICATION IN PARTITION CASES IS EXPRESSLY authorized by the Iowa code, and is sufficient as to non-resident minors; and if a guardian *ad litem* is appointed and answers for them, the judgment will conclude them. *Id.*
4. PARTY TO PARTITION ESTOPPED BY ACQUIESCENCE AND ACCEPTANCE OF SHARE. — If parties to a suit in partition acquiesce in the proceedings, and receive and retain their shares of the proceeds, they will be estopped from afterwards questioning the validity of the proceedings, as will one who takes a conveyance from them with knowledge of the facts. *Id.*
5. DOWER EXTINGUISHED BY PARTITION SALE AGAINST HUSBAND. — A sale of land in partition proceedings is a judicial sale, and such a sale of a husband's interest in land in a proceeding to which he is a party extinguishes the wife's right of dower therein, although she was not made a party to the proceeding. *Id.*

PARTNERSHIP.

1. PARTNER, LIABILITY OF PERSON WHO HAS HELD HIMSELF OUT AS. — The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief; and it must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as

from advertisements, shop-bills, signs, or cards, and from various other acts, from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent; and whether a party has so held himself out, or permitted it to be done, is, in every case, a question of fact, and not of law. *Fletcher v. Pullen*, 355.

2. **EVIDENCE THAT PLAINTIFF BELIEVED DEFENDANT TO HAVE BEEN PARTNER, ADMISSIBILITY OF.** — In an action against a party seeking to charge him as partner of another person, letters, circulars, and envelopes written and gotten up by the latter, without the knowledge or consent of the defendant, are admissible in evidence as a link in the plaintiff's case, for the purpose of showing that he believed, and had good reason to believe, that the defendant was a partner, and that he trusted the supposed firm upon the faith of his responsibility. *Id.*
3. **JURY MAY INFER THAT PERSON WAS HELD OUT TO PUBLIC AS PARTNER** with his knowledge and consent from the fact that he knew that his name was signed with that of the other person to an advertisement calling attention to their business, and soliciting from the public a continuance of confidence and orders, and did not insert in the newspapers in which such advertisements were published any denial of the partnership, and evidence of this fact is admissible, though the party dealing with the supposed firm never saw the advertisements, where it has been shown that he had trusted the firm in good faith and upon good grounds. *Id.*
4. **PERSON KNOWING THAT HE IS HELD OUT AS PARTNER IS CHARGEABLE** as one, unless he does all that a reasonable and honest man should do under similar circumstances to assert and manifest his refusal, and thereby prevent innocent parties from being misled, and whether or not he has done this is a question for the jury to determine. *Id.*
5. **PARTY SOUGHT TO BE CHARGED AS PARTNER OF ANOTHER MAY PROVE**, in defense of an action brought to charge him as such, that he refused to pay for advertisements of the alleged partnership, on the ground that he was not a partner; that he returned to the postmaster unopened mail matter addressed to such firm, stating that he had nothing to do with such other person's business, and was not his partner, and that he had successfully resisted a suit which had been brought against him as partner of such person. And he may also introduce in evidence a lease between him and such other person, to show that by its true construction it merely created the relation of landlord and tenant between them, and not that of actual partnership. *Id.*
6. **EQUITY OF PARTNERSHIP CREDITORS UNDER ASSIGNMENT FOR BENEFIT OF CREDITORS.** — If a partner who holds the assets of a dissolved partnership subject to the equities of its creditors makes an assignment for the benefit of creditors, such property will be held by his assignee subject to the same equities as against all the personal creditors of the assignor who, when they proved their claims, had notice of such equities. *Arnold v. Hagerman*, 712.
7. **PRACTICE — RELIEF.** — Where a bill in equity was filed on behalf of complainant alone to have partnership assets applied to the lien of his judgment, and the facts pleaded and established did not show him to have any special or peculiar lien, but only a right in common with all other partnership creditors to have the partnership assets marshaled for their benefit, a decree may, nevertheless, be entered marshaling such assets for his and their benefit in the same form as if the bill had been exhibited

on the behalf of the complainant, and all other creditors of the same class who might come in under it, if the prayer of the bill was for an appointment of the receiver to control and dispose of such assets under the direction of the court. *Id.*

8. **RIGHT TO HAVE PARTNERSHIP PROPERTY APPLIED TO THE SATISFACTION OF PARTNERSHIP DEBTS** is a right which each partner has as against the other; and they can by their agreement put an end to this right, as where they dissolve the partnership, and assign its property to one of their number, or to a stranger, without the reservation of the right. *Id.*
9. **EQUITY OF CREDITORS OF PARTNERSHIP TO HAVE ITS ASSETS APPLIED TO THE EXTINCTION OF ITS LIABILITIES** continues only so long as the right of partners against each other exists, and perishes when that terminates, except that the right cannot be defeated by alienations made with intent to hinder, delay, or defraud the firm creditors by defeating their equity. *Id.*
10. **FRAUDULENT TRANSFER OF PARTNERSHIP ASSETS. — TRANSFER OF PARTNERSHIP PROPERTY** by the copartners, or by one partner with the consent of the other partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent, and had sufficient property remaining to pay the partnership debts. *Id.*
11. **TRANSFER BY ONE PARTNER TO THE OTHERS OF ALL THE PARTNERSHIP PROPERTY** in consideration of his assumption of the partnership liabilities, when all knew that the firm and each of its members were insolvent, and could not meet his or their mutual obligations, cannot defeat the right of the firm creditors to have their demands satisfied out of such property before any of it shall be applied to the payment of the debts of the partner to whom the transfer was so made, because from such transfer a common intent to hinder, delay, and defraud the partnership creditors must be inferred, and furthermore, the transfer must be regarded as voluntary. *Id.*
12. **LIABILITY OF PARTNERSHIP FOR MISAPPROPRIATION OF TRUST FUND BY MEMBER OF FIRM. —** The mere fact that a partner who is a trustee or fiduciary improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, is not, without anything more, sufficient to entitle the *cestui que trust* to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case, the firm itself must be shown to have been implicated in the breach of trust, and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. *Englar v. Offutt*, 332.

See MASTER AND SERVANT, 1, 2.

PARTY-WALLS.

1. **WHERE THE OWNER OF TWO ADJOINING CITY LOTS** built a house upon each lot, each separated from the other by a brick wall, one half of which was on each lot, and afterwards conveyed the houses to different grantees by separate deeds, and in each deed described the boundary as "a line running longitudinally through the center of the partition wall between the houses," the wall thus referred to is thereby made a party-wall. *Everett v. Edwards*, 462.
2. **EACH OWNER OF A PARTY-WALL** may build it higher and use it as the lateral wall of such house as he may desire to erect, so long as he

does not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall, the owners have an equal right to it, and the value of the wall to either cannot be thereby impaired, and neither can so use the wall as to weaken or injure it. *Id.*

3. IN AN ACTION BY ONE OWNER OF A PARTY-WALL against the other to recover damages for building the wall to a greater height, plaintiff cannot maintain his suit merely on the ground that the wall was erected contrary to a statute or an ordinance. He must at least show some damage or detriment to himself in consequence. *Id.*

PAYMENT.

See NEGOTIABLE INSTRUMENTS, 6-8.

PENALTY.

See CONFLICT OF LAWS, 1; CONTRACTS, 5; OFFICIAL BONDS, 2.

PERSONAL EXAMINATION.

See TRIAL, 11.

PHOTOGRAPHY.

See EVIDENCE, 9.

PHYSICIANS AND SURGEONS.

1. SURGEON IS JUSTIFIED IN PERFORMING OPERATION UPON MARRIED WOMAN, with her consent, if he deems it necessary for the preservation and prolongation of her life. *State v. Housekeeper*, 340.
2. WIFE'S CONSENT TO PERFORMANCE OF SURGICAL OPERATION UPON HER IS SUFFICIENT to justify such performance, without proof of her husband's consent thereto. *Id.*
3. CONSENT OF PERSON SUBMITTING TO SURGICAL OPERATION IS PRESUMED, unless he was the victim of a false and fraudulent misrepresentation. If want of consent is alleged, it must be proved by the party who charges it. *Id.*
4. SURGEON IS BOUND TO EXERCISE ORDINARY CARE AND SKILL in the performance of an operation upon a patient, and therefore the law presumes, in the absence of proof to the contrary, that the operation was carefully and skillfully performed. *Id.*
5. DEATH OF PATIENT, SURGEON NOT LIABLE FOR, WHEN. — If the death of a patient upon whom a surgeon has performed an operation results from disease, and not from the operation, the surgeon is not liable for such death. And even if the disease resulting in the patient's death is caused by the operation, the surgeon is not liable if he performed the operation with the patient's consent, and under the belief that the operation was proper to be performed. *Id.*
6. DEGREE OF CARE AND SKILL REQUIRED OF SURGEON IN PERFORMANCE OF OPERATION upon a patient is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients; and if want of such care and skill is alleged, it must be proved by the party alleging it. *Id.*

PLEADING.

1. DECLARATION IN THIS CASE HELD SUFFICIENT AGAINST GENERAL DENUR-
RER. *State v. Currick*, 337.
2. THE DEMAND IN THE COMPLAINT IS NO PART of the action, and does not
give it character. The facts alleged do this, and plaintiff is entitled to
such relief as they warrant. *Strain v. Bobb*, 905.
3. LIMITATION OF ACTIONS — AMENDMENT TO PLEADINGS. — If, in an action
commenced in time on a policy of insurance providing that no action
can be maintained thereon which is not commenced within one year after
the death of the insured, judgment for plaintiff is reversed because the
relief asked for is legal, while that to which he is entitled is equitable,
he may then, though more than a year has elapsed since the commence-
ment of the action and the reversal, so amend his original pleadings as
to demand the equitable relief to which he is entitled. *Newman v. Cov-
enant Mutual Ins. Ass'n*, 196.
4. MOTION TO SET ASIDE ORDERS AND DECREE MADE THROUGH FAILURE OF
COUNSEL TO APPEAR AND MAKE RESISTANCE, DENIED WHEN. — Where
the attorneys for a party, against whom orders and decree were entered
owing to the failure of such attorneys to appear and resist the making
thereof, resided several hundred miles from the place where the court
in which the cause was pending was held, and, prior to the making of
such orders and decree, wrote a letter to the clerk asking to be advised
of papers filed, and to have copies sent, "if not too much trouble,"
which letter, though written nearly three weeks before the term com-
menced, was never answered, and the attorneys took no further steps to
inform themselves of the condition of the case until after the decree was
rendered, their failure to be present and make resistance will be deemed
inexcusable, and the motion to set aside the orders and decree will be
denied. *Williams v. Wescott*, 287.
5. SHOWING OF MERITS, INSUFFICIENT WHEN. — An affidavit made in support
of a motion to set aside a default judgment, by one of the attorneys of
the party against whom the judgment was rendered, which does not add
materially to the showing of merits made by the pleadings, is insuffi-
cient. *Id.*

See DAMAGES, 1; FRAUD, 7; LIMITATION OF ACTIONS, 1; MORTGAGES, 1.

PLEDGE.

See CORPORATIONS, 8, 9.

POUND-KEEPERS.

See ANIMALS, 1, 2.

POWER OF SALE.

See WILLS, 20.

PRESCRIPTION.

See EASEMENTS, 2.

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE.

See ANIMALS, 2; APPEAL AND ERROR, 2; ARBITRATION AND AWARD, 2, 5;
EVIDENCE, 14; NEGLIGENCE, 11, 15; FRAUDULENT CONVEYANCES, 7, 8;

JUDGMENTS, 5, 6; LIMITATION OF ACTIONS, 7; MUNICIPAL CORPORATIONS, 3; NEGOTIABLE INSTRUMENTS, 6-8; NOTICE, 5; PARENT AND CHILD, 3; PHYSICIANS AND SURGEONS, 3; RAILROAD COMPANIES, 6; REMAINDERMEN AND REVERSIONERS, 2; WILLS, 7.

PRINCIPAL AND AGENT.

See AGENCY.

PROCESS.

See HOLIDAYS; PARTITION, 1-3.

PROXIMATE CAUSE.

See MUNICIPAL CORPORATIONS, 6; NEGLIGENCE, 2.

PUBLIC LANDS.

See HOMESTEADS; LIMITATION OF ACTIONS, 2.

QUO WARRANTO.

See CORPORATIONS, 1.

RAILROAD COMPANIES.

1. RAILROAD COMPANIES HAVE A RIGHT TO A CLEAR TRACK in the prosecution of their lawful business, and also a right to the exclusive use and enjoyment of their property, subject to the conditions upon which all others own and use property; namely, that they must so use it as, with reasonable care, not to injure the person or property of others. *New Orleans R. R. Co. v. Bourgeois*, 534.
2. CONSTITUTIONAL LAW. — RAILROAD COMPANIES ARE NOT LIABLE IN DAMAGES for every injury inflicted by their trains, and a law so declaring, without reference to whether there was negligence on their part or not, is unconstitutional and void. *Id.*
3. RAILROAD COMPANIES ARE LIABLE FOR INEVITABLE ACCIDENTS OF misfortunes, in the same measure as natural persons. *Id.*
4. DUTY AS TO ANIMALS ON OR NEAR TRACK. — It is not the duty of a railroad company to check the speed of or stop its trains when an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track. If the animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, the company is not liable in damages. *Id.*
5. DUTY AS TO ANIMALS NEAR THE TRACK. — The use of the whistle or stock-alarm is generally sufficient, and all that is required to keep animals out of the way of the train; and unless appearances reasonably indicate danger of their going upon the track, neither the stopping nor an effort to stop the train is required; but when such danger is suggested, it must be heeded, and a failure to do so will constitute negligence. *Id.*
6. PRESUMPTIVE NEGLIGENCE — EVIDENCE TO OVERCOME. — Proof of injury inflicted by the running of the trains of a railroad company is *prima facie* evidence of the negligence of the servants of such company; AM. ST. REP., VOL. XIV. — 63

- but such evidence may be rebutted, and when the circumstances attending the injury are shown by the evidence, the case must be determined by the jury upon the facts, and not upon any presumption of negligence. *Id.*
7. EVIDENCE THAT OTHER TRAINS WERE RUN OVER SAME TRACK ON SAME DAY AT SAME RATE of speed as the train on which the plaintiff was injured is not admissible to show that the company was not negligent in running such train; nor is it admissible to show that the company had no notice of the condition of the track at the time, when other evidence, which this could not overcome, abundantly proved that it had such notice. *Meloy v. Chicago etc. R'y Co.*, 325.
 8. JURY MAY FIND THAT TRAIN WAS NEGLIGENTLY RUN at a dangerous rate of speed, without the aid of expert or direct testimony, where the evidence shows that the track was uneven, that it contained short curves caused by the sliding of the track on the wet clay, and that in places one side was up on planks while the other was out of sight in the mud, and the rate of speed was described by the witnesses. *Id.*
 9. NEGLIGENCE — EVIDENCE. — Where the declaration in an action against a railway company for personal injury alleges that an engine was old and worn out, and not supplied with proper brakes, evidence that such engine was supplied with hand-brakes only, while most of the other engines of the company had air-brakes, is admissible. *Savannah etc. R'y Co. v. Flannagan*, 183.
 10. NEGLIGENCE — EVIDENCE AS TO SPEED OF TRAIN. — In an action against a railway company for personal injuries, evidence is admissible to show the speed of the engine while on the company's property, and approaching the street where the accident occurred. *Id.*
 11. NEGLIGENCE — EVIDENCE OF SPEED OF TRAIN. — In an action against a railway company for personal injuries, evidence of the habitual high rate of speed of an engine, causing the accident, when run by the same engineer on the same street, is admissible, as is also evidence of his habitual neglect to ring the bell. *Id.*
 12. NEGLIGENCE. — EVIDENCE IS ADMISSIBLE, in an action against a railway company for damages for personal injuries, to show that, after the accident, the engines of the company ran more slowly at the place of the accident than they did previously. *Id.*
 13. NEGLIGENCE. — GENERAL RULE IS, THAT NEGLIGENCE CANNOT BE INFERRED from the rate of speed alone at which railway trains are run. *Dyson v. New York etc. R. R. Co.*, 82.
 14. NEGLIGENCE IN RUNNING TRAIN AT HIGH RATE OF SPEED OVER CROSSING. — The plaintiff's intestate was driving an omnibus on the highway, and was ran over and killed at a highway crossing by the defendant's passenger train, which was running at a high but not unusual rate of speed. The crossing was within the city limits, and the highway was much used, though the locality was not a thickly settled one, and the city, though having authority under its charter to do so, had made no order limiting the rate of speed of trains within its limits. The railroad curved as it approached the crossing, and the view was intercepted for the distance of two hundred feet on the highway, until the train was within about twenty feet of the crossing. Under this state of facts, it cannot be held that the defendant company was negligent by reason of the rate of speed maintained at the crossing. *Id.*
 15. DANGER SIGNALS AT CROSSINGS. — RAILROAD COMPANY IS NOT GUILTY OF NEGLIGENCE in not providing, at highway crossings, additional sig-

nals to those required by statute, the statute also authorizing the railroad commissioners to require other signals at crossings when they should deem them necessary for the protection of the public. Such statute is exhaustive, and defines the whole duty of such companies in the matter to which it relates. *Id.*

16. CANNOT BE HELD LIABLE FOR INJURY CAUSED by the collision of a train, run at a high rate of speed, with a vehicle at a highway crossing, because the fireman on the train, although he saw the vehicle at some distance from the crossing, did not call the attention of the engineer to it until it was again seen just before the collision. *Id.*
17. NO GENERAL DUTY RESTS UPON LOCOMOTIVE-ENGINEER in respect to a traveler whom he sees approaching a crossing. Ordinarily, he has a right to assume that the traveler will regard the signals if they have been given, and he is only called upon to act when the traveler is so near the crossing as naturally to startle him by a sense of danger. *Id.*
18. LIABILITY FOR DEFECTIVE CROSSINGS. — It is the duty of a railway corporation owning tracks running across a public street in a city to provide good and safe crossings, such as will enable travelers to pass over such tracks in safety; and if it carelessly and negligently permits the rails of such tracks to be and remain several inches above the road-bed and traveled way of the street, and above the ground between such rails, thereby rendering such crossings dangerous and unfit for travel, it is answerable in damages, if a person driving his wagon and team along the street at the crossing, exercising ordinary care, and having his load in a reasonably safe condition on the wagon, is thrown from his wagon and killed. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
19. LIABILITY FOR NEGLIGENCE IN OPERATING A CONSTRUCTION TRAIN. — A railroad company which agrees to furnish all motive power and cars, and operate the construction trains for a contractor who agrees to lay a certain number of miles of track per month, is not liable in damages for injury to one of the contractor's employees, caused by the rapidity with which a construction train was run, when, under the contract, the company had no control over the construction train, though the train crew were on the pay-roll of the company, and received their pay from it. *Miller v. Minnesota etc. R'y Co.*, 258.
20. DEVICES TO PREVENT FIRES. — It is the duty of railroad companies to use the best devices available to prevent the escape of fire from their engines, irrespective of the usage of other roads; and when an invention or appliance has been tested, and generally approved as better than that already in use by it, it then becomes its duty, with all reasonable diligence, to adopt and use such invention upon its engines, and it cannot defer doing this until it has been adopted and used exclusively by some other road. *Metzgar v. Chicago etc. R'y Co.*, 224.
21. LIABILITY FOR FIRES. — An instruction is properly refused in an action against a railroad company for damages caused by fire set by its engine, which ignores the fact that, so far as danger from fire is concerned, the company might reasonably use engines with one sort of smoke-stack at one season of the year, and in some localities, without risk, while it might be unable to use the same engines at other seasons of the year, and in other localities, without incurring risk. *Id.*

See CARRIERS; EVIDENCE, 5; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 14-25; NEGLIGENCE.

RECEIVING STOLEN GOODS.

See **CRIMINAL LAW**, 41.

RECORDS.

See **JUDGMENTS**, 1-4; **NOTICE**.

RECOUPMENT.

See **LANDLORD AND TENANT**, 4, 6; **SET-OFF**.

REFORMATION.

DEEDS, 1, 2.

REMAINDERMEN AND REVERSIONERS.

1. **RELATIONS BETWEEN TENANT FOR LIFE AND REMAINDERMEN** are such that the tenant cannot deal to his advantage, and to their disadvantage, by buying in the lands under a trust deed made by a former owner, for the purpose of destroying their title, and acquiring an independent title of his own. A release of a right made to a particular tenant for life or in tail inures to the benefit of him or them in remainder. *Allen v. De Groodt*, 626.
2. **ADVANCEMENT FOR CHILDREN OF TENANT FOR LIFE WILL BE PRESUMED TO HAVE BEEN INTENDED** when their father is such tenant, and they are remaindermen, and he purchases the land at a sale thereof for taxes, or under a trust deed made by a former owner. *Id.*
3. **JUDGMENT IN A TAX SUIT AGAINST THE TENANT FOR LIFE** does not bind the remaindermen, and a sale thereunder cannot divest their title. *Id.*
4. **STATUTE OF LIMITATIONS. — REMAINDERMEN CANNOT SUE FOR POSSESSION** during the continuance of the life estate. Therefore, the statute of limitations cannot affect them until the termination of such estate. *Id.*
5. **IMPROVEMENTS — ESTOPPEL. —** The fact that a remainderman stood by and permitted improvements to be made by the tenant for life without giving notice of his claim does not estop him from claiming such improvements upon the termination of the life estate. *Stewart v. Matheny*, 538.
6. **TAX TITLE. —** Tenant for life cannot acquire the title of the remainderman by purchase at a tax sale. *Id.*

See **NOTICE**, 6; **TRUSTS AND TRUSTEES**, 4.

REPLEVIN.

1. **REPLEVIN FOR PROPERTY TAKEN BY AN OFFICER UNDER A WRIT of attachment or execution against its owner** cannot be sustained, though the property is by law exempt from seizure under such writ. *Hawk v. Lapple*, 677.
2. **APPEAL BOND MUST BE GIVEN TO STAY EXECUTION IN REPLEVIN. —** The new condition to replevin bonds in magistrates' cases, added by the act of 1888, chapter 235, to the effect that the plaintiff will not only abide by and perform the judgment of the justice, but also "of the circuit court of the county or Baltimore city court, as the case may be," does not obviate the necessity of giving an appeal bond in such cases. *State v. Carrick*, 387.

RESCISSION.

See **CONTRACTS**, 7-10.

REWARDS.

1. **THE POLICY OF THE LAW FORBIDS A PUBLIC OFFICER**, or those called to aid him in the discharge of a public duty, receiving for his or their services any reward or compensation beyond that allowed by law. *St. Louis etc. R'y Co. v. Grafton*, 66.
2. **PERSONS ACTING AS A POSSE COMITATUS AND AS SPECIAL DEPUTY SHERIFFS**, and under the direction and immediate control of the sheriff of a county, and who, while acting in the discharge of their duty, arrest persons for whose arrest and conviction a reward has been offered, are not entitled to such reward, because in making such arrest they are simply doing their duty. *Id.*

RIPARIAN RIGHTS.

See WATERCOURSES.

RULE IN SHELLEY'S CASE.

See WILLS, 26.

SALES.

1. **SALE BY SAMPLE — WARRANTY.** — A sale of a specified number of "bales Ceara scrap-rubber, as per samples of second quality," imports warranty that the goods furnished will be similar to the samples, and that they will be of the quality promised, and there is a breach of warranty when the goods furnished are not of second quality, no matter whether they are equally as good as the samples or not. *Gould v. Stein*, 445.
2. **DESCRIPTION — WARRANTY.** — Where goods on a sale are described as of certain quality, well known in the market as indicating goods of a distinct though not absolutely uniform grade or standard, the description imports a warranty that the goods are of that grade or standard, and the descriptive words are not to be treated as merely words of general commendation, but as words having a specific commercial signification. *Id.*
3. **DESTRUCTION OF PROPERTY BEFORE TITLE IS ACQUIRED.** — Where the buyer unconditionally and absolutely promises to pay a certain sum for personal property, the title to which is to remain in the seller until full payment is made, the fact that the property is destroyed by fire before the time for the last payment to be made arrives, and while in the custody of the buyer, does not relieve the purchaser from the payment of the full price agreed upon. *Burnley v. Tufts*, 540.
4. **PURCHASER NOT AFFECTED BY FRAUD OF SELLER UNLESS A PARTY TO IT.** — Though a sale may be made to defraud creditors, the purchaser is not affected by it, unless he bought with intent to aid the fraudulent design of the seller, or had notice of it, or knowledge of such facts and circumstances as would lead a reasonable man to conclude that fraud in fact existed or was intended by the seller. *Tuteur v. Chase*, 577.

See AGENCY, 3; BONA FIDE PURCHASERS; CONTRACTS, 5; FACTORS; FRAUD; FRAUDULENT CONVEYANCES, 9, 10.

SCHOOLS.

1. **ELECTORS OF SCHOOL DISTRICT MAY RATIFY CONTRACT MADE BY DIRECTORS** of the district, where the contract is one which they might have

originally authorized the directors to make, even though the directors in entering into the contract exceeded the powers conferred upon them; and the subsequent action of the electors in authorizing the settlement of a controversy which grows out of the contract is a ratification. *Exerts v. District Township*, 264.

2. POSSESSION OF SCHOOL SITE IS NOTICE TO SUBSEQUENT PURCHASERS. — The possession by a school district of a school-house site, under a contract with the owner of the land, is notice to subsequent purchasers or encumbrancers of its rights, and those rights are not divested by the transfer without reservation of the tract of land of which the site is a part. *Id.*

See CORPORATIONS, 3.

SEDUCTION.

1. ARTIFICE, WHAT IS AN. — Where a married man forty-two years old had sexual intercourse with his domestic, a girl fifteen years of age, after continuous daily love-making for some months, it was held, in an action for seduction, that if the means made use of by the man were calculated to overcome the will of a girl of her years and experience, and were intended to create in her mind an affection for him, and did have that effect, and if under that influence she yielded her person to him, this amounted to an "artifice," within the meaning of the law, and the sufficiency of the evidence to establish that fact and constitute it seduction was for the jury. *Hawn v. Banghart*, 261.
2. DAMAGES FROM LOSS OF SOCIAL STANDING, in general, may be considered by the jury in estimating damages, but the fact that individual acquaintances or associates of plaintiff have refused to recognize her since her seduction cannot be taken into consideration in estimating damages, or for any other purpose. *Id.*

See CRIMINAL LAW, 45.

SET-OFF.

1. A DEFENDANT CANNOT SET UP AS A COUNTERCLAIM a claim purchased by him after the commencement of the action. *Enter v. Quesse*, 891.
2. DEFENDANT WILL NOT BE ALLOWED TO INTERPOSE AS A SET-OFF or counterclaim, either at law or in equity, a claim against his creditor, bought up after action brought, and sought to be interposed on the ground of the insolvency of such creditor. *Id.*

See FRAUD, 3.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. SUFFICIENCY OF DESCRIPTION. — A contract for the conveyance of land, which describes it as a certain congressional subdivision "lying south of the grove," cannot be avoided on the ground of vagueness or insufficiency in the description. Such description is certain, as a grove may be taken as a land-mark or monument designating the boundaries of land. *Minneapolis etc. R'y Co. v. Cox*, 216.
2. MUTUALITY. — Where a contract for the conveyance of land is made in consideration that the vendee shall erect and maintain a depot at a designated place, after the depot is built the vendor cannot avoid specific

performance on the ground that the vendee cannot be compelled to maintain the depot. *Id.*

3. A vendee may demand specific performance of a contract to convey land before complying with certain conditions subsequent, when the performance of certain conditions by the vendor are necessary to secure to the vendee his rights to be acquired under the contract. *Id.*

4. CONSTRUCTION OF CONTRACT. — Where a contract for the conveyance of land is made in consideration that a depot will be located, erected, and maintained at a certain place, and that trains will be run to and from such place before a given time, the contract cannot be avoided on the ground that the depot was not built by the time prescribed in the contract. The contract prescribes only the time when trains shall be running, and not the time when the depot shall be built. *Id.*

5. A contract for the conveyance of land cannot be avoided on the ground that it does not embody the agreement of the parties, and was signed in ignorance of such variation from the agreement. *Id.*

See WILLS, 10.

STATUTE OF FRAUDS.

See EASEMENTS, 1; WILLS, 10, 11.

STATUTES.

1. FUNDAMENTAL CANON OF CONSTRUCTION IS, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the legislature. *Lane's Appeal*, 94.

2. CURATIVE ACT, WHAT DEFECTS IN PROCEEDINGS OF BOARD OF SUPERVISORS MAY BE CURED BY. — If the proceedings of a board of supervisors of a county be void for want of jurisdiction, and if the thing wanting in such proceedings, or which failed to be done, is something which the legislature might have dispensed with by a prior statute, it is within the power of the legislature to dispense with it by subsequent statute. Where, therefore, a county board of supervisors proceed to construct a levee, and to assess the cost thereof against certain lands supposed to be benefited thereby, but its proceedings are adjudged to be void for want of jurisdiction, solely because "a petition was not filed in the office of the county auditor, signed by a majority of the persons, residents of the county, owning lands adjacent to the improvement, setting forth the same, and the starting-point, route, and *termini*," an act of the legislature subsequently enacted to validate such proceedings will not be unconstitutional, since the jurisdictional act was one with which the legislature could have dispensed in the first instance. *Richman v. Supervisors*, 308.

3. CURATIVE ACT WHICH PROVIDES OPPORTUNITY FOR HEARING UPON NOTICE before a burden by way of assessment shall attach to property supposed to be benefited by a public improvement is not obnoxious to the constitutional objection that it is an attempt to take private property without just compensation. *Id.*

4. LOCAL AND SPECIAL LEGISLATION, WHEN PERMISSIBLE. — An act, though both local and special in its application, where the accomplishment of its principal object would be very difficult, if not impossible, may not

be so obnoxious to a constitutional requirement that the legislature shall not pass local or special laws where the general law can be made applicable as to justify an interference by the courts. And where such is the case, the act will not be declared unconstitutional. *Id.*

5. **TITLE OF ACT NOT OBNOXIOUS TO CONSTITUTIONAL PROVISION WHEN.** — An act entitled "An act to legalize the proceedings of the boards of supervisors of Muscatine and Louisa counties in locating and constructing a levee on Muscatine Island, in said counties, and to provide for an assessment of the costs thereof on the lands benefited thereby," is not repugnant to a constitutional provision requiring that "every act shall embrace but one subject, and matters properly connected therewith." *Id.*

6. **SPECIAL STATUTES.** — While the legislature may pass laws which affect only certain localities and classes, still it cannot make an exemption from the operation of a general stock law in a particular locality, and then go further, and make an exception of certain individuals of a particular class within that exemption, simply on the ground that they had "conformed" to such general law, especially when the special and the general law are so essentially connected that the former cannot take effect separately. Such a law is unconstitutional and void. *Utsey v. Hiott*, 910.

See ELECTIONS, 1.

SUNDAY.

See HOLIDAYS.

SURETYSHIP.

1. **WHERE THERE ARE TWO SETS OF SURETIES OF AN EXECUTOR OR ADMINISTRATOR** upon bonds given at different times, both sets are answerable for breaches committed prior to the execution of the second bond. *Dugger v. Wright*, 48.
2. **CONTRIBUTION AMONG SURETIES.** — Where there are two or more sureties for the same principal debtor and for the same obligation, whether by the same or different instruments, they are co-sureties, and as between themselves are under obligation to equalize their common burden. *Id.*
3. **CO-SURETY'S RIGHT TO CONTRIBUTION** arises out of his payment of more than his due proportion of the joint obligation, and dates from such payment, unaffected by the fact that the statute of limitations has barred any direct liability of his co-surety to the creditor. *Martin v. Frantz*, 859.

See ATTACHMENT AND GARNISHMENT, 2-4; EXECUTORS AND ADMINISTRATORS, 3; OFFICIAL BONDS, 1, 4, 5; LIMITATION OF ACTIONS, 6.

TAX TITLES.

See REMAINDERMEN AND REVERSIONERS, 3, 6.

TELEGRAPHS.

1. **LIABILITY FOR DELAY IN TRANSMITTING MESSAGE.** — Where, in response to an offer to sell land, it is sought to accept the offer by telegraph, and a message authorizing the purchase is paid for and delivered to the authorized operator of the company, who is informed of the purpose of sending the message, and of the importance of its being sent and

delivered promptly, but owing to the delay and negligence of the company and its agents in the transmission and delivery of the message, the purchase of the land is lost, the company is liable in damages for the difference in price at which the land was offered and its actual market value at the time the message should have been delivered. *Alexander v. Western Union Tel. Co.*, 556.

- 2. GENERAL DUTIES AND LIABILITIES.** — Telegraph companies undertake to serve the public, and must perform their duties and comply with their contracts in good faith; and their failure to discharge their functions with reasonable care renders them liable in damages for losses and injuries that may be traced directly or with reasonable certainty to their negligence. *Id.*

See **BANKS AND BANKING**, 4.

TORTS.

See **ARREST; FRAUD**, 7

TOWNSHIPS.

See **HIGHWAYS**, 2, 3.

TRESPASS.

NON-PREJUDICIAL ERROR IN CHARGE TO JURY. — In trespass *quare clausum fregit*, where the plaintiff claimed title by adverse possession, a charge to the jury that "interruption by a stranger is not sufficient to destroy or interrupt title by adverse possession," though erroneous, is not prejudicial, where there is no evidence tending to show that the plaintiff's possession had been interrupted. *Wren v. Parker*, 127.

See **EVIDENCE**, 4.

TRIAL.

- 1. PLEADING AND PRACTICE.** — Under a general exception or objection to a charge, one cannot be allowed to select afterwards particular phrases, and found special exceptions thereon. *Commonwealth v. Tolman*, 414.
- 2. JURY AND JURORS.** — A juror, in weighing the credibility of testimony, has a right to take into consideration his own knowledge of the character of the witness delivering such testimony. *State v. Jacob*, 897.
- 3. JURY AND JURORS.** — **CREDIBILITY OF TESTIMONY SUBSTANTIALLY UNCONTRADICTIONED** is for the jury, and it is not within the province of the court to discredit such testimony in its instructions. *Dibble v. Northern Assur. Co.*, 470.
- 4. INSTRUCTIONS NOT BASED UPON ANY THEORY** raised in the case are properly refused. *Metzgar v. Chicago etc. R'y Co.*, 224.
- 5. REQUEST FOR INSTRUCTION MAY BE REFUSED WHEN** the legal principles contained therein have been fully and clearly presented to the jury in their instructions. *Smith v. Irwin*, 699.
- 6. INSTRUCTION.** — **A PARTY IS BOUND BY THE THEORY OF HIS OWN INSTRUCTIONS**, and cannot complain, after obtaining certain instructions, that the court refused to give other instructions inconsistent therewith. *Tetherow v. St. Joseph etc. R'y Co.*, 617.
- 7. INSTRUCTIONS NEED NOT BE GIVEN TO THE JURY ON QUESTIONS OF LAW NOT SUGGESTED** at the time by the parties or their counsel. *Id.*

8. **SPECIAL ISSUE.** — THE COURT NEED NOT SUBMIT TO THE JURY A SPECIAL ISSUE already included in those submitted, nor need it submit any question which may be answered affirmatively or negatively without affecting the general verdict. *Id.*
9. **CHARGE ON MATTER OF FACT.** — To say to the jury about an unimpeached witness, "Now, do you believe the witness? It is not a question as to her veracity. I have heard no evidence against her veracity. But counsel argue 'that she was mistaken,'"—is not a charge in respect to matter of fact so as to constitute error. *State v. Jacob*, 897.
10. **CHARGE ON MATTER OF FACT.** — Where the court tells the jury that an unimpeached witness having testified to a material fact, it is not probable that he was mistaken, and that if defendant had willfully misstated that one fact, it could be safely concluded that she would make other false statements, this is a charge as to matter of fact, and erroneous. *Id.*
11. **DAMAGES—POWER TO ORDER PERSONAL EXAMINATION OF PLAINTIFF.** — Where a party claims damages for an injury alleged to be permanent, the court has power, in its discretion, to order a compulsory personal examination of plaintiff, for the purpose of ascertaining the nature and extent of his injuries, by experts selected by the court and paid by the party at whose instance the examination is made. *Richmond etc. R. R. Co. v. Childress*, 189.
12. **CONTRARY RULINGS—WHICH CONTROLS.** — Where a demurrer to a petition for a writ of *certiorari* is overruled, and the defendant makes a return, and, on a trial of the issues made thereby, questions legitimately arise involved in the issues presented by the demurrer, and after the determination of the demurrer there is a change in the *personnel* of the court, it is the duty of the court, as then constituted, to pass upon such issues; and if, in such case, the court holds at variance with the ruling on the demurrer, the last ruling must control. *Richman v. Supervisors*, 308.
13. **OBJECTION TO ALMANAC AS EVIDENCE.** — That counsel used an almanac in his argument to the jury, to show that a witness testified falsely as to a certain date, is not open to objection on the ground that such use of the almanac deprived plaintiff of the benefit of argument upon it. Such surprises are incident to every trial, and within the discretion of the court. *Wilson v. Van Leer*, 854.

See CRIMINAL LAW; ELECTIONS, 2.

TROVER.

CONVERSION. — WHERE A WAREHOUSEMAN unlocks his warehouse upon the demand of an officer, and shows him particular goods of another stored therein, whereupon the officer attaches such goods under a writ in his hands, the warehouseman is not guilty of conversion, although the goods attached do not belong to the party named in the writ. *Clegg v. Boston Storage Warehouse Co.*, 436.

See LANDLORD AND TENANT, 6; MORTGAGES, 6.

TRUSTS AND TRUSTEES.

1. **TRUST FUNDS MIXED WITH THOSE OF TRUSTEE, IDENTIFICATION OF.** — So long as trust funds which the trustee has misapplied, or converted into other property, or mixed with his own funds, can be traced, the court will always attribute the ownership thereof to the *certain que trust*, and

will not allow his right to be defeated by the wrongful act of the trustee or fiduciary in mixing or confusing the trust funds with his own, or even with those of a third party. *Englar v. Offutt*, 332.

2. RIGHT OF OWNER OF FUND TRACED TO POSSESSION OF ANOTHER. — The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him; and it makes no difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened. *Id.*

3. TRUST PROPERTY, HOWEVER CHANGED, CONTINUES SUBJECT TO TRUST. — As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, nowever much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust. *Id.*

4. WHERE A TRUST IS CREATED BY WILL in favor of the testator's daughter, and her children then or thereafter born, the daughter to have the possession, use, profits, enjoyment, and control of the property during her life, then to descend equally to her children and grandchildren, the appointment of a new trustee for the daughter alone, upon the petition of herself and the first trustee, but without the consent of the remaindermen, will not vest in the trustee so appointed the legal title to the estate, so that he can convey it in fee without the consent of the remaindermen. He has only a legal estate proportional with the daughter's estate for life, and the first trustee is still clothed with his executory trust for the remaindermen. *Lamar v. Pearre*, 168.

5. STATUTE OF LIMITATIONS. — Where, under a trust for life, with remainder over, the trustee has the legal title to the estate, commensurate only with the life estate of the beneficiary, the trustee and such beneficiary cannot convey the estate in fee without the consent of the remaindermen, and if such conveyance is attempted, the statute of limitations will not begin to run against the remaindermen until the death of the tenant for life. *Id.*

See PARTNERSHIP, 12.

USAGES AND CUSTOMS.

1. CUSTOM, TO BE PROVED, MUST BE PLEADED; so held where it was attempted to prove a custom of bankers, in paying drafts on them, to pay exchange in addition to the face of the draft. *Lindley v. First Nat. Bank*, 254.

2. KNOWLEDGE OF A USAGE NEED NOT BE SHOWN BY DIRECT EVIDENCE, BUT MAY BE INFERRED from circumstances or implied from its notoriety. Hence it may be inferred that the superior officers of a corporation knew of a custom existing in violation of a rule of such corporation, when such custom was well known among its employees, and of long standing. *Barry v. Hannibal etc. R'y Co.* 610.

USURY.

1. STATUTE OF ARKANSAS DENOUNCES the taking of usury, and upon all contracts for its payment impresses the stamp of absolute nullity; and

- this blight covers the entire transaction. It extends to the principal as well as to the unlawful interest contracted for. *Vahlberg v. Keaton*, 73.
2. **USURY CANNOT BE IMPUTED TO THE RESERVING AND RECEIVING IN ADVANCE** the highest lawful rate of interest. *Id.*
 3. **DISCOUNT.** — The interest for ordinary paper having the usual time to run, such as is the custom of banks, may be taken in advance by way of discount, and not subject the paper to the taint of usury. *Id.*
 4. **CONSTITUTIONAL LAW.** — The provision of the constitution of Arkansas denouncing the taking of usury must be understood as prohibiting that which had been judicially determined to be usury under pre-existing statutes of the state, or under the act of 12 Anne, upon the same subject, and a statute, therefore, does not violate this constitution because it permits interest to be taken in advance. *Id.*
 5. **WHAT A BORROWER PAYS TO HIS OWN AGENT** for procuring a loan is no part of the sum paid for the loan or for the forbearance of money, and therefore cannot be regarded as impressing the transaction with the taint of usury. *Id.*
 6. **BONUS PAID TO LENDER'S AGENT.** — If the agent of the lender receive from the borrower a bonus in excess of the highest lawful rate of interest, either with the lender's knowledge or under circumstances from which the law presumes he had knowledge, then the transaction is usurious; while if the agent receives the bonus without the lender's knowledge, and under circumstances from which knowledge cannot be reasonably presumed, the transaction is not usurious. If a lender places money with an agent to be loaned, with the understanding that he must receive the highest lawful interest, and must look to the borrower for his commission, the circumstances necessarily import knowledge of the lender of a usurious bonus received by the agent; and if the money was so placed, and nothing said as to the compensation of the agent, the same result must follow, unless the relations between the lender and his agent are such as to reasonably justify the belief that the agent would act solely for the accommodation of the lender, and without expectation of reward. *Id.*

VENDOR AND VENDEE.

VENDOR'S LIEN DOES NOT EXIST WHEN the vendee, in consideration of the conveyance of land to him, gives his contract to deliver the vendor specified quantities of personal property. *Bell v. Pelt*, 57.

See **SPECIFIC PERFORMANCE**, 1-5.

VOLUNTARY CONVEYANCES.

See **FRAUDULENT CONVEYANCES**, 5-8.

WARRANTY.

See **SALES**, 1, 2.

WATERCOURSES.

1. **TITLE TO ICE ON GREAT POND** is in the public, and an individual cannot appropriate a part thereof by scraping the snow from it, and setting up stakes, so as to maintain his action against one who, five days thereafter, began to cut ice from the portion of the pond thus staked off. *People's Ice Co. v. Davenport*, 425.

2. RIPARIAN PROPRIETORS—RELATIVE RIGHTS OF UPPER AND LOWER.—

The lower owner of land on a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. The upper owner will not be allowed to poison or corrupt the stream, but he may, as a rule, use it in a reasonable manner, for reasonable purposes, even for the purpose of carrying off waste matter; and whether the use to which he puts it is reasonable or not must be determined by the circumstances of the case. *Ferguson v. Firmenich Mfg. Co.*, 319.

3. POLLUTION OF STREAM—LIABILITY OF UPPER OWNER FOR CONTRIBUTING TO.—

If an upper owner on a stream contributes to its pollution after it has been already polluted above him, but what he contributes renders the water unfit for stock and charges it with noxious gases, when before it was fit for stock and free from such gases, he will be liable in damages to the lower owner. *Id.*

4. LOWER OWNER WHO CONTRIBUTES TO POLLUTION OF STREAM CANNOT RECOVER

damages of the upper owner for polluting it, if his own acts contribute to cause those things of which he complains. But if he sustains damage from the wrongful acts of the upper owner, to which he has not contributed, he may recover. *Id.*

5. MEASURE OF DAMAGES FOR POLLUTION OF STREAM.—

Where the upper owner on a stream so pollutes it as to not only render the water unfit for stock, but to make it a source of sickness, pain, and discomfort to the lower owner and his family, the lower owner is entitled to recover not only for the depreciation in the rental value of the premises caused by the nuisance, but also such other damage as he may have sustained, including that which has resulted from bodily sickness, pain, and discomfort. *Id.*

6. FLOATAGE—RIGHTS OF MILL-OWNER.—

The floatage capacity of a small stream cannot be added to by means of dams, and other expedients and artificial means, so as to deprive the owner of a mill-site of the use of it, and he may enjoin the wrong-doer from retaining water to such an extent as to prevent the mill from getting constantly the natural volume of the stream, and from letting out floods which will injure his dam. *Koopman Blodgett*, 527.

7. RIGHT OF FLOATAGE.—

While the public right of floatage exists in streams capable of furnishing valuable facilities for moving logs cut in the vicinity, still the public have no other rights than those furnished by the natural water-way. The riparian owners have a right to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means. No easement beyond the natural one can be obtained without authority, and no further public facility can be exacted without some dedication or condemnation. *Id.*

8. RIGHT OF FLOATAGE

in public navigable streams is general, but the rule which makes private streams subservient to floatage is based on their natural surroundings, and rests on convenience, if not on necessity. They cannot be treated as public highways for floatage from all quarters, nor subjected to burdens from distant localities. *Id.*

9. RIGHTS OF MILL-OWNER.—

A party owning a suitable place for a mill-site cannot be deprived of it simply because some one else has wrongfully interfered with the stream above him. Without either such a lapse of

- time as will bar a suit or indicate acquiescence, or some act of estoppel, his rights of property are not barred. *Id.*
10. **MILL-OWNER'S WAIVER OF OBJECTION TO RIGHT OF FLOATAGE.** — While straightening the channel of a stream above his mill by the owner, at the expense of a log-runner, indicates an admission that logs might be run, and that the channel was thereby made safer for his own premises as well as more convenient during log-driving, still this admission in no way authorizes the use of the river so as to crowd it beyond its fair capacity, or to take such action as involves danger to the mill. *Id.*
 11. **SURFACE WATER.** — Owner of higher land has no right to collect surface water in drains, trenches, or otherwise, and precipitate it in a body upon lower land, to the damage of the owner thereof. *Rychlicki v. City of St. Louis*, 651.
 12. **SURFACE WATER.** — A MUNICIPAL CORPORATION MAY NOT, IN THE CONSTRUCTION OF ITS STREETS, collect surface water, and then, by means of drains and conduits, discharge it in volume upon the lands of an adjacent proprietor. *Id.*
 13. **SURFACE DRAINAGE AND CULTIVATION OF LAND.** — The owner of land on the slope of a hill running down to a mill-pond on the land of another is not liable for filling such pond by cultivating, manuring, and surface-draining his own soil in the ordinary way, for the purpose of raising garden vegetables. *Middlesex Co. v. McCue*, 402.
 14. **DAMAGE TO LOWER PROPRIETOR** resulting from the usual and reasonable cultivation of his land by the upper proprietor is not ground for an action, but the lower proprietor may protect his land by building a wall upon it to prevent the damage. *Id.*

See NUISANCES, 1, 2.

WILLS.

1. **TESTAMENTARY CAPACITY.** — One who at the time of executing his will was capable of recollecting the property he was to dispose of, understanding the manner of disposition therein set forth, the objects of his bounty, and the nature of the business in which he was engaged, is possessed of requisite testamentary capacity. *Waddington v. Buzby*, 706.
2. **UNDUE INFLUENCE.** — THE INFLUENCE WHICH WILL VITIATE A WILL must be such as in some degree destroys the free agency of the testator, and constrains him to do what is against his will, and which he is unable to refuse or too weak to resist. *Id.*
3. **DRAFTED BY INTERESTED PARTY.** — The fact that a will was drawn by one who was made executor, and whose children were the favored legatees, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will. Whether a will so drawn shall be permitted to stand or not must depend on the circumstances of each particular case; no general rule must be made applicable to all cases. *Id.*
4. **EXECUTION OF A WILL IS SUFFICIENTLY PROVED** when it appears that it was executed in the presence of two witnesses, though the clause of attestation does not say that they signed in the presence of the testator, if it is shown that the testator and the witnesses were all together when he signed, and that he requested them to sign as witnesses of such will. *Id.*
5. **SUBSCRIBING WITNESS** to a will, if in all respects eligible, assumes a serious duty and a legal relation thereto necessary to its validity, if

there are but two subscribing witnesses, and important, however many there may be. This duty he cannot cast off for any cause at his pleasure without the consent of the maker of the will, given in his lifetime. Having subscribed as such witness, the law holds him to the legal consequences of such relation. *Boone v. Lewis*, 783.

6. **SUBSCRIBING WITNESS, TO BE HELD LIABLE** to the legal consequences following such relation, must have consented to sign as such, and must have subscribed to the will as a witness thereof in the presence of the testator. *Id.*
7. **SUBSCRIBING WITNESS — PRESUMPTION.** — When a person's name appears in or about the place where subscribing witnesses place their names to a will, it is presumed that he is a subscribing witness thereto, but this may be explained by him, or by any party interested, by showing how and why the subscription came to be made, and that in fact the person so subscribing was not a witness as he is purported by the writing to be. *Id.*
8. **SUBSCRIBING WITNESS.** — A person purporting by the will itself to be a subscribing witness thereto, but not present when it was proved, may afterwards show, before a court having jurisdiction, in a proper case, that he was not such witness, and though the burden of proof is on him to show this, still when he proves it, he is entitled to any benefits conferred upon him by the will, and which must be withheld were he a witness thereto. *Id.*
9. **SUBSCRIBING WITNESS.** — A person purporting to be a subscribing witness to a will, from the fact that his name appears thereon at or near the place where subscribing witnesses sign, may nevertheless prove that he was not requested, nor did he consent, to witness the will under which he claims; that he simply witnessed the signature of a witness to the will, who identified himself and his signature by his cross-mark, supposing that such attestation itself required a witness. *Id.*
10. **WILL AS CONVEYANCE — STATUTE OF FRAUDS — SPECIFIC PERFORMANCE.** — A will providing that the beneficiary thereunder shall have immediate possession of the land of the testatrix, provided he shall take the latter and care for her as one of his own family during her natural life, is a sufficient compliance with the statute of frauds, where the beneficiary takes possession and complies with his part of the contract as indicated by the paper; and in such case, the fact that it is not to take effect finally until the testator's death will not prevent specific performance during the testator's lifetime. *Smith v. Tuit*, 851.
11. **EJECTMENT — STATUTE OF FRAUDS — WILL AS CONVEYANCE.** — Defendant in ejectment, who has taken and retains possession, and has performed his part of the contract as indicated in the will of a living person, providing that he shall take immediate possession of the land in dispute, on condition that he will take and care for testatrix as one of his own family during her natural life, cannot be deprived of his possession because the contract is contained in the will. The latter is a sufficient compliance with the statute of frauds, as constituting a memorandum for the sale of lands. *Id.*
12. **VALIDITY OF EXECUTION OF WILL IS TO BE DETERMINED** by the law in force at the time of its execution, and not by the law in force at the death of the testator. unless the later law is clearly retrospective. *Lane's Appeal*, 94.

13. **IN CONSTRUING WILL, COURT SHOULD, IF POSSIBLE, AVOID ANY CONSTRUCTION** which would result in partial intestacy. Another principle is, that the construction should be such as not to disinherit the heirs at law, unless on so strong a probability that an intention to the contrary cannot reasonably be supposed. *Peckham v. Lego*, 130.
14. **IN INTERPRETING WILLS**, the cardinal principle is, to arrive at and carry out the intention of the testator, if it is lawful. *Morrison v. Sessions*, 500.
15. **ADOPTED CHILD — CONSTRUCTION OF WORDS "LAWFUL HEIRS."** — Where a testator bequeaths his property to his "lawful heirs," it will be held that he intended to include only a class upon whom descent of property is cast by the statutes of descent, and not to include an adopted child as one of his heirs. *Id.*
16. **CONSTRUCTION AND ERROR.** — In the absence of a clear manifestation of intent on the part of a testator to postpone to an uncertain and possibly distant time after his death the vesting of the title to his estate in his children, the law prefers, and presumes that he intended, that it should vest at the moment when the will should become operative. *Johnes v. Beers*, 101.
17. **RULE IS WELL ESTABLISHED**, that where there is a bequest or devise to A, and in case of his death to B, if A survives the testator, he takes absolutely, there being nothing else in the will decisive of the matter. And where a testator left part of his estate in trust for the use of his widow for life, and after her death to be converted into money and divided equally among his children, and in case of the death of any of his children, the share of the decedent to go to his or her issue, or if there were no issue, then to the surviving children or their issue, it was held that the general rule applied, and the children of the testator surviving him took their shares absolutely, subject to the life use of his widow. *Id.*
18. **A TESTATOR LEFT THE RESIDUE OF HIS ESTATE IN TRUST FOR HIS FOUR CHILDREN**, to be converted into money upon his decease and divided equally among them, and if either of his children should die "before he or she shall have received his or her share," then such share to go to his or her lawful issue, or if there was no issue, then to the surviving children, or their issue, if deceased. In such case, the words "shall have received" are to be interpreted as meaning "shall have become entitled to receive by surviving me"; and the children surviving the testator are entitled to take absolutely at his death. *Id.*
19. **WHEN ESTATE VESTS IN DEVISEE.** — In common understanding, the devisee of an estate in fee-simple absolute "receives" it at the moment of the testator's death, although the enjoyment may be postponed to a future time. *Id.*
20. **POWER OF SALE IN A WILL, TERMINATION OF.** — If a devise is made to one who is also appointed sole executor, and authorized as such to sell and convey property at any time he may deem expedient, without designating any object for which the power should be exercised, the power terminates with the life of such devisee and executor. *Sites v. Eldredge*, 769.
21. **GIFT OF USE AND IMPROVEMENT OF ESTATE DURING LIVES OF BENEFICIARIES.** — A testatrix, by her will, gave to F. and his wife the "use and improvement" of certain estate "during their natural lives," continuing as follows: "Should it be necessary for their personal

comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as possible for the children born to them." Under this will, the estate given to F. and his wife was a life estate only, with the right to use any portion of the property to the extent needed for their support in a manner suited to their condition and circumstances in life; and the remainder was given to the children born to F. and his wife, and not the heirs of the testatrix generally. *Peckham v. Lego*, 130.

22. CONSTRUCTION — LIFE ESTATE. — A bequest by a testator of the "improvements" and "income" of his dwelling-house and lot to his wife for her own use, "so long as she keeps my name," with directions that she should pay his debts, and, if necessary, sell so much of the land as should be required for that purpose, and to keep the rest, and in case of her remarriage, she was to have "one half of all my real and personal property for her own use," creates only a life estate in the devisee during widowhood. *Long v. Paul*, 862.

23. CONSTRUCTION OF WORDS "DYING WITHOUT CHILDREN." — Where a testator, after giving all his estate to his wife for life, and creating a trust of five thousand dollars, to take effect at her death, in favor of his son for life, then bequeaths "the rest, residue, and remainder" of his estate remaining after the death of his widow to his "daughter Hannah, her heirs and assigns," and if the latter "should die without child or children," then his estate to be equally divided between his brother and sisters, an indefeasible estate in fee is created in the daughter if she survives her mother, as the words "should die without child or children" evidently mean die without child or children during the lifetime of the testator's widow. *McCormick v. McElligott*, 837.

24. REAL ESTATE WHEN INCLUDED IN A DEVISE. — A clause in a will stating that the testator gives and bequeaths to his wife "all my real and personal estate, consisting of clothing, jewelry, money, and all the instruments, desks, office appurtenances, and other property of like nature now belonging to me, and purchased prior to May 1, 1884, and now in the office of the firm of S. & H.," vests in the wife all the real estate of the testator. The word "real," as used in this clause, is not cut down or limited by the context so as to make it include only the chattels nominated. *Sites v. Eldredge*, 769.

25. RESTRAINT ON POSSESSION. — Provisions in a will, requiring a trustee to hold and manage the trust property until the beneficiary reaches an age beyond twenty-one years, are not necessarily void if the interest of the beneficiary is vested and absolute. Under this rule, the testator may direct the trustee to pay portions of the trust funds to the beneficiary when he reaches the age of twenty-one, twenty-five, and thirty years, respectively; and such direction is not void as against public policy, nor inconsistent with the beneficiary's rights of property. *Olafson v. Olafson*, 393.

26. RULE IN SHELLEY'S CASE, LEASEHOLD PROPERTY WITHIN. — Where a testator by his will gives and bequeaths all his property, consisting of houses and vacant lots, to his adopted child "during her natural life, with remainder over to the heirs of her body, if she should have any," said property being leasehold property, and in a subsequent clause of the will gives to her all the residue of his property, of whatsoever name or nature, without limitation or restriction, the bequest in the first clause is, by analogy at least, directly within the rule in Shelley's case; *AM. ST. REP., VOL. XIV.* — 64

- the gift of the leasehold interest to said child for life, with remainder over to the heirs of her body, entitles her to the absolute interest, which is not restricted by the words "if she should have any heirs"; and even if the provisions of the second clause indicate that the testator intended to give her only a life estate under the first clause, the words actually used in the first clause bring the gift within the rule, and the intention must give way, and the fixed rule must be followed. *Hughes v. Niklas*, 377.
27. **LEGACY — COUPON BOND.** — A specific bequest of a bond carries with it an overdue negotiable coupon physically attached to it at the time of the testator's death. *Ogden v. Patten*, 401.
28. **LEGACY.** — **INTEREST** must be allowed on a pecuniary legacy after one year from the testator's death, notwithstanding the fact that the will was not proved until six months after the expiration of the one year. *Id.*
29. **CONVERSION OF REAL PROPERTY INTO PERSONALTY BY WILL, SO AS TO CUT OFF THE TITLE OF THE HEIRS,** does not take place unless the executor or other donee of the power takes the fee by necessary and inevitable implication, or such fee is in express terms conferred on him. *Bueberg v. Carter*, 664.
30. **GIFT — PUBLIC CHARITY.** — A gift by will to a supposititious and non-existing corporation, by name, is not a public charity, and cannot be claimed by another incorporated institution of nearly similar name and nature, under the doctrine of *cy-pres*. Even if the supposititious donee was in existence at the date of the will, still the charity would terminate if the donee ceased to exist before coming into possession of the gift, and it would go to the heirs at law and next of kin of the testator, as undevised property. *Stratton v. Physio-Medical College*, 442.
31. **WHAT IS. — A DEVISE OF PROPERTY, TO "CONSTITUTE A SACRED TRUST** for the express purpose of spreading the light of social and political liberty and justice in these United States of America," creates a charitable use. *George v. Braddock*, 754.
32. **THE ONLY RESTRICTION WHICH HAS BEEN IMPOSED ON DEVISES FOR THE BETTER DISTRIBUTION OF SPECIFIED WRITINGS OR BOOKS** is, that the writings to be circulated must not have, when considered with respect to their purpose, a general tendency of hostility to religion, law, or morals. *Id.*
33. **THE COURTS WILL PERMIT THE ENFORCEMENT OF A TESTAMENTARY USE** which is designed to circulate works calling in question fundamental rules and establishments of the law, and agitating the question whether such law has or has not any better foundation than wrong and injustice. *Id.*
34. **A DEVISE OF PROPERTY TO BE USED IN DISTRIBUTING OVER THE LAND** the publications of Henry George on the land question and cognate subjects will be sustained and enforced, though all such publications teach doctrines antagonistic to the law, in this, in teaching that the earth belongs to all mankind, and is an inalienable heritage, and that no private ownership can rightfully exist therein. *Id.*

See EJECTMENT, 2; EVIDENCE, 7, 8.

WITNESSES.

1. **COMPETENCY TO PROVE HANDWRITING.** — It is within the province of the court to hold a witness competent to testify as to the genuineness of

handwriting, on the ground of his familiarity with it, though the witness has not seen the alleged writer write later than thirty-two years before the trial, and then had only seen him write two or three times. The jury, however, are the judges of the weight to which such evidence is entitled. *Wilson v. Van Leer*, 854.

2. **COMPETENCY TO PROVE HANDWRITING.** — No arbitrary limit of time can be fixed within which a witness must have seen writing done in order to be competent to testify to its genuineness. His intelligence, habits of observation, and apparent strength and confidence of memory must first be considered by the court, and if it determines to admit his evidence, the jury must then determine what weight they will accord it. *Id.*
3. **COMPETENCY OF LEGATEE.** — In an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment, or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit. *Hest v. Ogle*, 839.
4. **COMPETENCY.** — A person who has merely an incidental interest in the result of a suit, such as arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest at any time before he offers himself as a witness, and if he does so, his evidence is not inadmissible on the ground of interest. *Id.*
5. **IMPEACHMENT OF FOREIGN WITNESS.** — The bad character of a witness who has removed to and resided in another state for eight years before the time of trial may be shown by proof of his character at the time he removed to such other state, although the impeaching witnesses do not know the character which he bore at the latter place. *Watkins v. State*, 155.
6. **CROSS-EXAMINATION — WHOLE OF CONVERSATION ADMISSIBLE.** — Where a witness, on cross-examination, is asked as to a certain conversation, with a view to laying the foundation for his impeachment, he has a right under all circumstances to give the whole of the pertinent matter of such conversation in evidence. *Savannah etc. R'y Co. v. Holland*, 158.
See **CIVIL RIGHTS**, 2, 4; **LIBEL AND SLANDER**, 8, 9; **WILLS**, 5-9.

WOMAN'S RIGHTS.

See **ELECTIONS**, 1.

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